No. 17-626 **Vide 17-586**	
Title:	**Greg Abbott, Governor of Texas, et al., Appellants** **v.** **Shannon Perez, et al.**
Docketed:	October 30, 2017
Lower Ct:	United States District Court for the Western District of Texas
Case Numbers:	(SA-11-CV-360)
Decision Date:	August 24, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Oct 27 2017	Statement as to jurisdiction filed. (Response due November 29, 2017)
Oct 27 2017	Appendix of Greg Abbott, Governor of Texas, et al. filed.
Nov 29 2017	Motion to dismiss or affirm filed by appellees Mexican American Legislative Caucus, et al. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 29 2017	Motion to dismiss or affirm filed by appellees Texas Latino Redistricting Task Force. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Nov 29 2017	Brief amici curiae of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Reply of appellants Greg Abbott, Governor of Texas, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 12 2018	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. Further consideration of the question of

	jurisdiction in No. 17-586 is postponed to the hearing of the case on the merits. The cases are consolidated and a total of one hour is allotted for oral argument.
Jan 12 2018	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases will now be reflected on the docket of No. 17-586. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 17-586. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the flings is submitted; a document filed in all of the consolidated cases will be noted as "VIDED."
Feb 23 2018	SET FOR ARGUMENT on Tuesday, April 24, 2018. VIDED
Mar 07 2018	CIRCULATED

NAME	ADDRESS	PHONE
Attorneys for Appellants		
Scott A. Keller Counsel of Record	Solicitor General P.O. Box 12548 (MC 059) Austin, TX 78711-2548 scott.keller@oag.texas.gov	(512) 936-1700
Party name: Greg Abbott, Governor of Texas, et al.		
Attorneys for Appellees		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: United States		
Pamela Susan Karlan Counsel of Record	Stanford Law School Supreme Court Litigation Clinic 559 Nathan Abbott Way Stanford, CA 94305 karlan@stanford.edu	650-725-4851
Party name: Mexican American Legislative Caucus, et al.		
Nina Perales Counsel of Record	MALDEF 110 Broadway Suite 300 San Antonio, TX 78205 nperales@maldef.org	2102245476

Party name: Texas Latino Redistricting Task Force

Other

Elizabeth Baker Murrill
Counsel of Record

Office of the Louisiana Attorney General
P.O. Box 94005
Baton Rouge, LA 70084-9005

225-326-6766

murrille@ag.louisiana.gov

Party name: Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin

RECORD AND BRIEFS

17 626

FILED
OCT 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

PAUL D. CLEMENT
ERIN E. MURPHY
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas
JEFFREY C. MATEER
First Assistant
Attorney General
SCOTT A. KELLER
Solicitor General
Counsel of Record
MATTHEW H. FREDERICK
Deputy Solicitor General
MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General
OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the district court issued an appealable interlocutory injunction when it invalidated Texas' duly enacted redistricting plan and ordered the parties to appear at a remedial hearing to redraw Texas House of Representatives districts unless the Governor called a special legislative session to redraw the Texas House map within three business days.

2. Whether the Texas Legislature acted with an unlawful purpose when it enacted Texas House of Representatives districts originally imposed by the district court to remedy any potential constitutional and statutory defects in a prior legislative plan that was repealed without ever having taken effect.

3. Whether any of the invalidated districts that were unchanged from the 2012 court-imposed remedial plan to the 2013 legislatively adopted plan (in Bell, Dallas, and Nueces Counties) are unlawful, where the district court in 2012 issued an opinion explaining why these districts were lawful.

4. Whether the Texas Legislature had a strong basis in evidence to believe that consideration of race to maintain a Hispanic voter-registration majority was necessary in HD90 in Tarrant County, where one of the plaintiffs in the lawsuit told the Legislature it had to keep the district's population above 50% Spanish-surnamed voter registration to avoid diluting Hispanic voting strength.

PARTIES TO THE PROCEEDING

Plaintiffs in the district court are Shannon Perez, Gregory Tamez, Nancy Hall, Dorothy DeBose, Carmen Rodriguez, Sergio Salinas, Rudolfo Ortiz, Lyman King, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Jamaal R. Smith, Debbie Allen, Sandra Puente, Kathleen Maria Shaw, TJ Carson, Jessica Farrar, Richard Nguyen Le, Wanda F. Roberts, Mary K. Brown, Dottie Jones, Mexican American Legislative Caucus - Texas House of Representatives (MALC), Texas Latino Redistricting Task Force, Joey Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz, Rebecca Ortiz, Margarita V Que da, Romeo Munoz, Marc Veasey, Jane Hamilton, John Jenkins, Eddie Rodriguez, City of Austin, Constable Bruce Elfant, Travis County, David Gonzalez, Milton Gerard Washington, Alex Serna, Sandra Serna, Betty F. Lopez, Beatrice Saloma, Joey Martinez, Lionor Sorola-Pohlman, Balakumar Pandian, Nina Jo Baker, Juanita Valdez-Cox, Eliza Alvarado, the League of United Latin American Citizens (LULAC), Henry Cuellar, Texas State Conference of NAACP Branches, Howard Jefferson, Bill Lawson, Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green, United States of America, Rod Ponton, Pete Gallego, Filemon Vela, Jr., Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, Patricia Mancha, and Juan Ivett Wallace.

Defendants in the district court are Greg Abbott, in his official capacity as Governor of Texas, Rolando Pablos, in his official capacity as Texas Secretary of State, the State of Texas, Steve Munisteri, in his official capacity as Chair of the Texas Republican Party, Boyd Richie, Gilberto Hinojosa, in his official capacity as Chair of the Texas Democratic Party, and Sarah M. Davis.

TABLE OF CONTENTS

Page

Questions Presented I

Parties to the Proceeding II

Jurisdictional Statement 1

Opinion Below 5

Jurisdiction 5

Constitutional and Statutory Provisions Involved 5

Statement 5

The Court Should Note Probable Jurisdiction or Summarily Reverse 14

I. This Court Has Jurisdiction to Review the District Court's Order. 15

II. All Claims Against Districts in Plan H283 That Were Imposed by the District Court in 2012 Are Meritless. 18

A. The 2013 Legislature Could Not Possibly Have Acted with an Unlawful Purpose When It Adopted Districts Ordered by the District Court. 18

B. Plan H358 Never Was Infected By Any Discriminatory "Taint." 21

1. The District Court's Finding of a Discriminatory "Taint" Is Grounded in an Impermissible Advisory Opinion 22

2. There Is Not and Never Has Been Vote Dilution in Bell County. 22

3. There Is Not and Never Has Been Vote Dilution in Dallas County. 27
4. There Is Not and Never Has Been Vote Dilution in Nueces County. 28
III. The District Court's Finding of Improper Race-Based Decisionmaking in HD90 Contravenes This Court's Precedents. 33
Conclusion 37

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott v. Perez,
No. 17A245, 2017 WL 3783708 (Aug. 31, 2017) (Alito, J., in chambers) 14
Abbott v. Perez,
No. 17A245, 2017 WL 4014810 (Sept. 12, 2017) 4, 14
Abrams v. Johnson,
521 U.S. 74 (1997) 7, 8
Bartlett v. Strickland,
556 U.S. 1 (2009) 22, 23
Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 3, 35
Brown v. Thomson,
462 U.S. 835 (1983) 25, 32
Bush v. Vera,
517 U.S. 952 (1996) 26
Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.,
137 F.3d 1420 (9th Cir. 1998) 18

Cases—Continued:

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 15, 18

Chapman v. Meier,
420 U.S. 1 (1975) 20

Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.,
867 F.2d 1455 (3d Cir. 1989) (en banc) 18

Cooper v. Harris,
137 S. Ct. 1455 (2017) 3, 35

Davis v. Abbott,
781 F.3d 207 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) 12

Easley v. Cromartie,
532 U.S. 234 (2001) 27

Etuk v. Slattery,
936 F.2d 1433 (2d Cir. 1991) 16

Harris v. Ariz. Indep. Redistricting Comm'n,
136 S. Ct. 1301 (2016) 25, 26, 30

Hunt v. Cromartie,
526 U.S. 541 (1999) 24

Larios v. Cox,
300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *aff'd*, 542 U.S. 947 (2004) 12, 31

McCutcheon v. FEC,
134 S. Ct. 1434 (2014) 15

Miller v. Johnson,
515 U.S. 900 (1995) 19, 20

Palmer v. Thompson,
403 U.S. 217 (1971) 27–28

Cases—Continued:

Perez v. Abbott,
No. 5:11-cv-360, 2017 WL 3668115 (W.D. Tex. Aug. 24, 2017) 5

Perry v. Perez,
565 U.S. 1090 (2011) 7

Perry v. Perez,
565 U.S. 388 (2012) (per curiam) 1, 6, 7, 8, 23

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 24

Rodriguez v. Pataki,
308 F. Supp. 2d 346 (S.D.N.Y. 2004) (per curiam), *aff'd*, 543 U.S. 997 (2004) 33

Salazar ex rel. Salazar v. Dist. of Columbia,
671 F.3d 1258 (D.C. Cir. 2012) 16, 18

Shaw v. Reno,
509 U.S. 630 (1993) 22

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 10

Texas v. United States,
887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*,
133 S. Ct. 2885 (2013) 9

Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.,
756 F.3d 380 (5th Cir. 2014) 16

Thornburg v. Gingles,
478 U.S. 30 (1986) 28

White v. Weiser,
412 U.S. 783 (1973) 8

Wise v. Lipscomb,
437 U.S. 535 (1978) 18

Constitutional Provision and Statutes:

TEX. CONST. art. III, sec. 26 28

28 U.S.C.

§1253 ..... 5, 15

§1292(a) 15–16

§2284 5

52 U.S.C.

§10301 5

§10304 6

Miscellaneous:

Order, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 28, 2017) 17

Proclamation by the Governor, No. 41-3324 (May 27, 2013) 10

In the Supreme Court of the United States

No. _____

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Five years ago, this Court ordered the three-judge district court in this case "to draw interim maps" for the State of Texas' 2012 elections "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). The district court followed this Court's command when it formulated remedial maps and ordered the State to conduct its 2012 elections to the Texas House of Representatives under a court-ordered remedial plan known as Plan H309. As the district court explained in a detailed opinion in 2012, Plan H309 addressed all of the statutory or constitutional deficiencies that had been identified in the Texas Legislature's initial 2011 map.

While Texas could have continued to pursue the litigation necessary to employ its duly enacted 2011 map in subsequent elections, the State opted for a more conciliatory approach in an attempt to end this litigation: it accepted the district court's decision and adopted the

court-ordered remedial plan as its own, making only minor changes to a handful of districts. In 2013, the Texas Legislature repealed the 2011 Texas House plan and enacted a new plan, Plan H358, which incorporated all but a few districts unchanged from the court-ordered Plan H309. The 2011 plan therefore never took legal effect: it was formally repealed before it was ever used to conduct a single election. Subsequent elections were held under a remedial map first imposed by the court and then adopted with only slight modifications by the Legislature.

The plaintiffs amended their complaints to assert claims against the newly enacted Plan H358, but instead of moving on to pursue their claims against that plan—the only live plan for the Texas House of Representatives—the district court allowed the plaintiffs to continue pursuing their moot claims against the repealed 2011 Texas House plan. The district court spent nearly four years adjudicating claims against the defunct and never-employed 2011 plan, finally issuing a decision in April 2017. While the court was adjudicating claims against the long-dead 2011 plan, Texas held two more elections under Plan H358.

Now, five years and three election cycles after *ordering* Texas to use the map that later largely became Plan H358, the district court has held that the Legislature engaged in intentional discrimination when it adopted the court-imposed districts as its own. In fact, almost all of the districts where the court found violations were adopted *verbatim* from the court-imposed plan (in Bell, Dallas, and Nueces Counties).

The district court's finding of intentional racial discrimination in those districts relies on the same grievously flawed conception of intentional discrimination that pervades its order on the State's congressional plan: The district court held that, when adopting nearly every district in the 2012 court-imposed map as its own, "the Legislature in 2013 purposefully maintained the intentional discrimination in Plan H283"—the Texas House plan that was enacted in 2011 but never precleared, never in effect, never used to conduct a single election, and repealed in 2013.[1] J.S. App. 84a. In reality, the Legislature adopted Plan H358 to eliminate, not perpetuate, any potential defects in Plan H283—defects that, in all events, never existed in the first place.

The district court also plainly erred in finding a violation in one of the few districts (HD90) that the Legislature did change in 2013 from the court-imposed 2012 map. As to that district, the district court concluded—in direct conflict with this Court's precedents, *see, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017)—that "avoid[ing] a potential VRA problem" is just "a vague goal" that does not supply the requisite

---

[1] *See* J.S. App. 6a ("This Court's analysis in the Order on Plan C235 concerning the intent of the 2013 Legislature applied to both Plan C235 and Plan H358."); *id.* at 84a-85a ("[V]iolations found by this Court in its Order on Plan H283 and not sufficiently altered in Plan H358 now require a remedy, including specifically in Bell County, Dallas County, Nueces County, and Tarrant County.").

"strong basis in evidence" to conclude "that the VRA required [the] use of race," J.S. App. 81a. That conclusion is neither legally nor factually sustainable.

The Legislature revised HD90 after the Mexican American Legislative Caucus (MALC), a plaintiff in this litigation, insisted that failure to do so would violate VRA §2. Yet despite the Legislature's attempt to maintain Hispanic voting strength in HD90, a different plaintiff *still* raised a claim of vote dilution—the same plaintiff who alleged racial gerrymandering. By sustaining that racial-gerrymandering claim even though the use of race was plainly designed to avoid a VRA §2 violation, the district court left the State with no breathing room to achieve compliance with both the Constitution and the VRA. More fundamentally, the district court's conclusion that changes made to HD90 at the behest of the plaintiffs in this litigation still could not "cleanse" the 2011 maps of their purported "taint" only underscores that, in the district court's profoundly misguided view, future Legislatures can *never* truly escape the charge of discriminatory intent that the court levied at the 2011 Legislature.

This Court has already stayed the district court's order pending appeal. *Abbott v. Perez*, No. 17A245, 2017 WL 4014810 (Sept. 12, 2017). The Court's plenary review is warranted to reverse the district court's novel constitutional-for-the-courts-but-not-for-the-Legislature theory and its prohibitive interpretation of strict scrutiny—both of which are plainly wrong, but at a minimum present substantial questions for this Court's review.

OPINION BELOW

Appellants appeal the three-judge district court's Order on Plan H358, *Perez v. Abbott*, No. 5:11-cv-360, 2017 WL 3668115 (W.D. Tex. Aug. 24, 2017), J.S. App. 3a-87a. That order incorporated the district court's prior findings and opinions on the 2011 map. *Id.* at 7a n.5.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1253. *See infra* Part I. Appellants filed their notice of appeal on August 28, 2017, J.S. App. 1a-2a. The Court has jurisdiction to consider claims regarding the currently operative Plan H358, but claims against the repealed 2011 map are moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourteenth Amendment and §2 of the Voting Rights Act (VRA), 52 U.S.C. §10301. The relevant provisions are reproduced in the appendix to this jurisdictional statement. *See* J.S. App. 437a-439a.

STATEMENT

A. In 2011, the Texas Legislature enacted reapportionment plans for Texas state legislative and congressional districts. Before the Legislature even enacted these redistricting plans, however, the plaintiffs filed this lawsuit raising claims against the State under the Constitution and VRA §2, and the Chief Judge of the Fifth Circuit constituted a three-judge district court under 28 U.S.C. §2284.

VRA §5 prevented the 2011 plans from taking legal effect until they were precleared. *See* 52 U.S.C. §10304. Texas filed suit in the United States District Court for the District of Columbia seeking preclearance. Unless and until preclearance was granted, claims against the 2011 plans under the Constitution and VRA §2 remained unripe, leaving the district court here without subject-matter jurisdiction to rule on the merits. The 2011 plans were never precleared.

B. While the preclearance lawsuit was pending, the Texas three-judge district court here conducted a two-week trial beginning on September 6, 2011, regarding the constitutional and VRA §2 claims against the 2011 maps. Because a final judgment in the preclearance litigation seemed unlikely to come in time for the 2012 election cycle, the district court ordered the parties to submit proposed interim plans for the 2012 elections.

In November 2011, by a 2-1 vote with Judge Smith dissenting, the district court ordered the 2012 Texas House elections to be conducted under a court-ordered plan (H302). Concluding that it "was not required to give any deference to the Legislature's enacted plan," the district court announced that it had drawn an "independent map" based on "neutral principles that advance the interest of the collective public good." *Perez*, 565 U.S. at 396.

Texas moved to stay that interim plan pending appeal. On December 9, 2011, this Court granted the State's motion to stay, noted probable jurisdiction, is-

sued an expedited briefing schedule, and set oral argument for January 9, 2012. *Perry v. Perez*, 565 U.S. 1090 (2011) (mem.).

On January 20, 2012, the Court vacated the district court's order in a unanimous opinion. *Perez*, 565 U.S. at 399. The Court held that "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id.* at 396.

This Court emphasized that the district court's mission was remedial, not a freewheeling mandate to pursue the collective good, and gave the court specific instructions—six separate times—to implement plans that complied with the Constitution and the VRA:

- "'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).
- "[T]he state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy

judgments with the court's own preferences." *Id.* at 394.

- "A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* (citing *Abrams*, 521 U.S. at 85-86; *White v. Weiser*, 412 U.S. 783, 797 (1973)).
- "[A] district court should still be guided by [the State's] plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.*
- The district court should "take guidance from the lawful policies incorporated in such a[n unprecleared] plan." *Id.* at 395.
- The district court's "mission [is] to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* at 396.

C. On remand, the district court adopted and imposed Plan H309 as an interim remedial plan for the Texas House redistricting. J.S. App. 300a. The court explained that it followed this Court's "direction to leave undisturbed any district that is free from legal defect," J.S. App. 303a, and that Plan H309 "obeys the Supreme Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced." J.S. App. 313a. The district court noted that §5 objections based on discriminatory purpose were reviewed under "the low 'not insubstantial' standard." *Id.* Plan H309 reconfigured 28 of the

State's 150 House districts; 21 were "altered substantially."[2] But Plan H309 retained without change the House districts in Bell, Dallas, Nueces, and Tarrant Counties as configured in the 2011 plan.

D. After the D.C. district court denied preclearance to the 2011 plans, *see Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.), the State appealed that ruling to this

---

[2] In Plan H309, the district court reconfigured HD41 to address a claim that the Legislature violated the one-person, one-vote doctrine by overpopulating four heavily Democratic districts in Hidalgo County and underpopulating the fifth district in order to protect the Hispanic Republican incumbent, who had recently switched parties. J.S. App. 304a-305a. It reconfigured HD35, a largely rural district in South Texas, moving it to the Rio Grande Valley to address a "not insubstantial" claim of retrogression under VRA §5. *Id.* at 305a-306a. It reconfigured HD117, a district on the outskirts of San Antonio in Bexar County, to address a "not insubstantial" claim of intentional discrimination under VRA §5. *Id.* at 306a-307a. It reconfigured HD144 in eastern Harris County as a Hispanic opportunity district to address a claim of vote dilution under VRA §2. *Id.* at 309a-311a. It reconfigured HD149 in western Harris County to address a "not insubstantial" claim of retrogression under VRA §5. *Id.* at 311a-312a. And it reconfigured HD77 and HD78 in El Paso County to address a "not insubstantial" claim of intentional discrimination under VRA §5. *Id.* at 311a-312a. The district court expressly declined to reconfigure the House districts in Nueces County, which lost a House seat based on the 2010 Census, because it found that the plaintiffs were not likely to succeed on claims of vote dilution under VRA §2, and any retrogression caused by the loss of a seat had been offset by the creation of HD144 as a new Hispanic opportunity district. *Id.* at 308a-309a.

Court. The State's 2012 Texas House elections were conducted under the district-court-ordered Plan H309.

E. While the State's appeal in the preclearance case was pending, the Texas Attorney General encouraged the Legislature to adopt the district-court-ordered remedial Plan H309 as the State's permanent reapportionment plan. J.S. App. 440a-446a. On May 27, 2013, the Governor called the Legislature into a special session "[t]o consider legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." Proclamation by the Governor, No. 41-3324 (May 27, 2013).

Similar to the congressional Plan C235, in which the 2013 Legislature adopted the 2012 court-imposed plan verbatim, the vast majority of the districts (136 of 150) in the 2013 Legislature's map for the Texas House were identical to the court-ordered Plan H309. The remaining few districts made minor changes to the court-imposed plan.

The 2013 Legislature formally repealed the 2011 redistricting plans and adopted Plan H358 on June 24, 2013. The next day, this Court held that VRA §4(b)'s coverage formula was unconstitutional and could "no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). A day later, the Texas Governor signed into law the bill adopting Plan H358.

F. After the Legislature repealed the 2011 plans, the State moved to dismiss the claims against those plans as moot. J.S. App. 323a. The district court summarily denied the motion without even awaiting a response from the plaintiffs. *Id.* at 324a. The district court then granted the plaintiffs leave to amend their complaints to assert claims against the plans enacted in 2013. But the court also allowed the plaintiffs to continue challenging the repealed 2011 plans, permitting the plaintiffs to amend their pending claims to seek preclearance bail-in under VRA §3—once again rejecting the State's argument that claims against the repealed 2011 plans were moot. *Id.* The district court also granted a motion to intervene by the United States, which challenged only the 2011 plans. *Id.* at 95a n.7. After extensive additional discovery, the district court held a second trial on claims against the repealed 2011 Texas House plan in July 2014. *Id.* at 327a.

G. More than two years later, on April 20, 2017, the district court held by a 2-1 vote that many of the claims against the repealed 2011 plan, H283, were not moot. J.S. App. 88a, 275a-276a. The majority then found that the plaintiffs proved their claims of intentional vote dilution under VRA §2 and the Fourteenth Amendment "in El Paso County (HD78), Bexar County (HD117), Nueces County (the elimination of HD33 and the configuration of HD32 and HD34), HD41 in [Hidalgo County], Harris County, western Dallas County (HD103, HD104, and HD105), Tarrant County (HD90, HD93), Bell County (HD54), and with regard to Plan H283 as a whole." *Id.* at 275a. The majority also found the State liable for racial gerrymandering in HD117 in Bexar County. *Id.* Finally,

the majority rejected claims that the statewide plan violated the one-person, one-vote principle under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *aff'd*, 542 U.S. 947 (2004) (mem.), but it found county-level one-person, one-vote violations in Nueces County (HD32 and HD34), Hidalgo County (HD31, HD36, HD39, HD40, and HD41), and Bell and Lampasas Counties (HD54 and HD55). J.S. App. 276a.

Judge Smith dissented, both on jurisdictional grounds and on the merits. *Id.* at 277a-299a. On jurisdiction, he found that claims against the 2011 map were moot because the map had been repealed and was never in effect. *Id.* at 279a-280a. Judge Smith's reasoning on mootness already had been adopted by the Fifth Circuit in a related case involving the State's 2011 redistricting plan for the Texas Senate. *See Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) (holding that Texas "repealed the 2011 plan and adopted the district court's interim plan in its place, thus mooting Plaintiffs' lawsuit" and depriving the district court of jurisdiction to vacate its preliminary injunction).

On the merits, Judge Smith concluded that "the majority commit[ted] grave error in its recitation of redistricting law," J.S. App. 278a, and that "the majority's factual findings [we]re so extreme as to defy logic and reason under this record," *id.* at 280a.[3]

---

[3] Had the claims been live, Judge Smith would have concurred in the majority's conclusion, regarding one-person, one-vote claims, that "the State erred in assuming, without support in the law, that the ten-percent test offers an unassailable safe haven." J.S. App. 278a n.1 (Smith, J., dissenting).

H. Although the State had repeatedly told the district court that its electoral districts must be set by October 1, 2017, to avoid disruption of deadlines for the November 2018 elections, trial on the operative 2013 maps (*i.e.*, Plan H358) did not begin until July 2017. *Id.* at 327a.

On August 24, 2017, the district court issued a divided decision invalidating Plan H358. *Id.* at 3a-87a. Notwithstanding the fact that the court itself had ordered the State to use the largely indistinguishable Plan H309 five years earlier, and notwithstanding that this plan was adopted by the 2013 Legislature with a different purpose (resolving the ongoing dispute about the Texas House of Representatives districts by embracing the court's remedial plan as its own), the court concluded that the State engaged in intentional vote dilution. It reasoned that the Legislature engaged in intentional discrimination by preserving verbatim from the district court's remedial map HD54 and HD55 (in Bell County); HD32 and HD34 (in Nueces County); and HD103, HD104, and HD105 (in Dallas County). *Id.* at 84a-85a. And in Tarrant County, where the 2013 Legislature *did* redraw HD90 to address concerns raised by plaintiffs in this case, the court nonetheless found that the Legislature failed to remedy "intentional discrimination. . . affecting HD90 and HD93," and that it engaged in racial gerrymandering in redrawing HD90. *Id.* at 85a.

The court gave the Governor three business days to either order a special session of the Legislature or consult with experts, prepare remedial map proposals, and appear at a hearing on September 6, 2017, to redraw

Texas' House districts on an expedited basis. *Id.* at 86a-87a.

Texas filed a notice of appeal of the district court's order on Plan H358. *Id.* at 1a-2a. After the district court denied Texas' stay motion, Justice Alito, acting as Circuit Justice for the Fifth Circuit, entered a temporary stay and requested a response from the plaintiffs. *Abbott v. Perez*, No. 17A245, 2017 WL 3783708 (Aug. 31, 2017) (Alito, J., in chambers). This Court then granted a stay "pending the timely filing and disposition of an appeal to this court" on September 12, 2017. *Perez*, 2017 WL 4014810.

THE COURT SHOULD NOTE PROBABLE JURISDICTION OR SUMMARILY REVERSE

According to the district court, the Texas Legislature engaged in intentional discrimination by enacting into law Texas House districts identical to those the district court itself had ordered the State to use. That bears repeating: the court concluded that the Legislature engaged in *intentional* discrimination by enacting nearly all of *the court's own remedial map*. That remarkable decision defies law, logic, and fact. Even accepting the court's fundamentally flawed premise that a Legislature must "cleanse" past legislation of the "taint" of a previous Legislature's "discriminatory intent" before adopting it, the Legislature plainly did not act with unlawful purpose when it took the district court at its word that the court's own remedial map did indeed remedy the potential constitutional and VRA violations that the court identified. What was a valid remedy when embraced by

the three-judge court does not somehow become intentionally discriminatory when embraced by the State Legislature.

Nor is there any racial gerrymandering violation in HD90, the single invalidated district that the 2013 Legislature changed from the 2012 court-imposed map. HD90 was revised to address a specific concern raised by the Mexican American Legislative Caucus—a plaintiff in this case—that failure to maintain the percentage of Spanish-surnamed registered voters in HD90 would result in vote dilution. The district court's conclusion that the Legislature's good-faith effort to address threatened VRA §2 claims did not justify the consideration of race cannot be reconciled with this Court's precedents, as it eliminates what little breathing room legislatures have left to draw districts that comply with the many competing demands that federal and state law impose.

I. This Court Has Jurisdiction to Review the District Court's Order.

This Court has jurisdiction to review the three-judge district court's order because it constitutes an interlocutory injunction, and federal law authorizes a direct appeal to this Court. 28 U.S.C. §1253. The Court has "no discretion to refuse adjudication of the case on its merits" when an appeal is properly brought under §1253. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

While the district court did not label its order an "injunction," this Court has made clear that appellate jurisdiction turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28

U.S.C. §1292(a)). Interpreting *Carson*, lower courts have consistently held that "[e]ven if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012); *see also, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991).

That is precisely the case here, as the district court's order has the "practical effect" of preventing the State from conducting elections under its duly enacted redistricting plan. The district court held, among other things, that the "violations found by this Court in its Order on Plan H283 [the repealed 2011 plan] and not sufficiently altered in Plan H358 *now require a remedy*, including specifically in Bell County, Dallas County, Nueces County, and Tarrant County." J.S. App. 84a-85a (emphasis added). The court further held that that if the Legislature does not redraw the districts, the district court will. *Id.* at 86a. Indeed, the district court gave the Governor a mere three business days to decide whether to call the Legislature into special session to draw new maps. *Id.* And in the event the Governor declined to accede to that demand (he declined), the court ordered the parties to consult with mapdrawing experts, confer on the possibility of agreeing to a remedial plan, and come prepared to offer proposed remedial plans at a hearing to redraw Texas' House of Representatives map on September 6, 2017. *Id.* at 86a-87a. Simply put, there can be no serious

dispute that the district court's order enjoins Texas from conducting future elections under Plan H358.

To be sure, the deadlines set by the district court have come and gone without a redrawn map, but that is only because this Court stayed the order. The district court undoubtedly would promptly reschedule the hearing to redraw the map were the stay lifted.[4] The order thus alters the status quo and disrupts the State's election procedures by forbidding Texas from using H358 in future elections.

The district court's claim that it "has not enjoined [Plan H358's] use for any upcoming elections," Order, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 28, 2017) (ordering the parties "to proceed with preparations for the remedial hearing as previously directed"), is no bar to this Court's jurisdiction. No matter how the district court labels its order, it is an injunction in substance. If the order were not intended to block the State from using Plan H358—and to do so immediately—there would have been no reason to put the Governor under a three business-day deadline or to order the parties to rush to redraw maps less than two weeks after declaring Texas House districts in four counties invalid. After all, this Court's precedent requires "afford[ing] a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather

---

[4] In fact, after Justice Alito granted a temporary stay of the district court's order on the State's congressional plan, C235, the district court issued an "advisory" encouraging the parties to continue preparing for its remedial mapdrawing on a "voluntary" basis. J.S. App. 436a.

than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.). The district court's August 24, 2017 order therefore has the practical effect of an injunction blocking Plan H358.

The order satisfies all other aspects of appealability analysis. It "affect[s] predominantly all of the merits," *Salazar*, 671 F.3d at 1262, and alters the status quo, *see Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998); *Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.*, 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). It is certain to have a "serious, perhaps irreparable, consequence," *Carson*, 450 U.S. at 84, because it invalidates multiple districts and compels the State to redraw the Texas House map. And the order can be "'effectually challenged' only by immediate appeal," *id.*, because appellate review from a final judgment after the imposition of remedial maps would come too late to prevent the irreparable harm of being forced to use a new court-ordered map for the 2018 elections. The practical effect of the district court's order therefore establishes this Court's jurisdiction.

II. All Claims Against Districts in Plan H283 That Were Imposed by the District Court in 2012 Are Meritless.

A. The 2013 Legislature Could Not Possibly Have Acted with an Unlawful Purpose When It Adopted Districts Ordered by the District Court.

The district court invalidated Texas' House map on the theory that the Legislature engaged in intentional

discrimination when it enacted as its own a redistricting plan nearly identical to the one that the district court itself ordered the State to use in 2012. Adopting the flawed purpose reasoning from its Order on the 2013 congressional map, Plan C235, the court concluded that the Legislature failed to remove the "taint" of discrimination that supposedly lingered from the 2011 plan that the district court's remedial plan replaced—even though that is precisely what the 2012 remedial plan was supposed to accomplish under this Court's mandate in *Perry v. Perez*. That extraordinary holding, which expressly incorporated the purpose analysis from its Order on Plan C235, J.S. App. 6a ("This Court's analysis in the Order on Plan C235 concerning the intent of the 2013 Legislature applied to both Plan C235 and Plan H358."), is just as wrong regarding the Texas House map as it was regarding the State's congressional map. *See* Jurisdictional Statement at 15-29, *Abbott v. Perez*, No. 17-586 (Oct. 17, 2017) (explaining the grave flaws in the district court's purpose analysis regarding Plan C235).

In holding that the Texas Legislature acted for race-based reasons when it enacted Plan H358, the district court's order ignored "the presumption of good faith that must be accorded legislative enactments," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), as well as its duty to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," *id.* The presumption of good faith accorded to legislative enactments means that plaintiffs bear the burden of untangling permissible and impermissible motivation, and

any doubt must be resolved in favor of the Legislature. *Id.* The presumption carries particular weight in the context of redistricting legislation because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915.

Contrary to those well-established principles, the district court applied a presumption of *invalidity* and resolved every doubt against the Legislature. The court's extraordinary decision reasoned that Plan H358 was infected with "taint" that the Legislature was required to (but failed to) cure—even though H358 largely mirrored the remedial plan imposed by the district court itself. *See, e.g.*, J.S. App. 357a (Order on Plan C235) (faulting the State for failing to "cleanse the plans of continuing discriminatory intent or legal defect"); *id.* at 6a (incorporating the purpose reasoning from its Order on Plan C235). Indeed, all but one of the districts with which the district court took issue were identical to the districts the court itself ordered the State to use in its 2012 elections.

The notion that the Legislature engaged in intentional discrimination by adopting the court's own remedial map makes neither legal nor practical sense. When the Legislature embraced that remedial map as its own, it did so out of a desire to comply with the Constitution and the VRA and bring an end to this litigation. The Legislature had the benefit of judicial guidance unavailable in 2011—namely, the district court's own 2012 opinion

finding that Texas House districts in Bell County, Dallas County, Nueces County, and Tarrant County did not contain "plausible legal defects." *See id.* at 313a. The Legislature also had a keen sense of the costs of continuing litigation and a seemingly obvious mechanism to ensure that future elections to the Texas House of Representatives would be conducted under lawful districts.

Rather than continuing the litigation over the 2011 map, the Legislature accepted the court-ordered Plan H309 as to the lines that changed and, except for a handful of districts, as to the lines that the court did not find a basis to change. That action, particularly when viewed through the lens of the presumption of good faith and validity, cannot be understood as anything other than a good-faith effort to adopt a districting map that complied with all governing law.

B. Plan H358 Never Was Infected By Any Discriminatory "Taint."

As explained in the previous section, the 2013 Legislature could not possibly have had an unlawful purpose in adopting districts imposed by the district court itself, in a map drawn under an order from this Court to remedy any potential constitutional and VRA violations. In all events, there was nothing unlawful about these districts to begin with, and thus no lingering "taint" from the 2011 Legislature's map for the 2013 Legislature to "cure."

1. The District Court's Finding of a Discriminatory "Taint" Is Grounded in an Impermissible Advisory Opinion.

At the outset, like its order on the State's congressional plan, the district court's order invalidating Plan H358 depends on its previous adjudication of moot claims against a 2011 plan that never took legal effect. For the same reasons it never should have decided the moot claims against the repealed congressional plan, the district court should have dismissed all claims against the never-implemented Plan H283 as soon as it was repealed. *See* Jurisdictional Statement, *Abbott v. Perez*, No. 17-586, at 25-28 (Oct. 17, 2017) (explaining the absence of jurisdiction to rule on the repealed 2011 congressional plan). But even setting aside its impermissible issuance and subsequent reliance on an advisory opinion, the district court had no legal or factual basis to find that the 2011 Legislature engaged in intentional vote dilution in need of "curing" in Bell County, Dallas County, or Nueces County—as explained below.

2. There Is Not and Never Has Been Vote Dilution in Bell County.

a. Intentional vote dilution requires proof of both vote-dilutive effect and discriminatory intent. *Shaw v. Reno*, 509 U.S. 630, 641 (1993). And vote-dilutive effects exist only when plaintiffs have proven that additional compact minority opportunity districts could have been drawn. *E.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (plurality op.). The district court never made such

a finding in Bell County, nor could it. J.S. App. 18a ("The Court found no § 2 results violation in Plan H283 . . . .").

The district court did not hold that VRA §2 required the Legislature to draw a coalition district in Bell County combining African-American and Hispanic voters.[5] *Id.* at 20a-21a (declining to address the question of voting cohesion between Hispanic and African-American voters in Bell County). Because the population was not sufficiently numerous to draw an African-American- or Hispanic-majority district in the county, this amounted to a holding that VRA §2 did not require the Legislature to draw *any* minority opportunity district in Bell County. The district court therefore had no basis to find a vote-dilutive effect in Bell County and thus no basis to find intentional vote dilution.

b. Unsurprisingly, given that there was no vote-dilutive effect to begin with, the district court also had no basis to find any discriminatory intent. *Id.* at 18a ("[C]onsidering all the evidence, the Legislature's intentional failure to create the proposed districts was not intentional vote dilution."). The 2011 Legislature plainly drew the two districts in Bell County—HD54 and HD55—with incumbency and "partisan advantage," not race, in mind. *See* J.S. App. 278a (Smith, J., dissenting). Due to population growth, HD54 could no longer include both Burnet

---

[5] Regardless, this Court already concluded—in this case—that there is "no basis" in law to require any coalition district even if there is racially-polarized voting and the coalition satisfies all *Gingles* requirements. *Perez*, 565 U.S. at 397; *see Bartlett*, 556 U.S. at 15 ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions.").

County and Lampasas County. The incumbent, Representative Aycock, drew HD54 with the undisputed goals of maintaining his relationship with Lampasas County and favoring his reelection. *Id.* at 182a-183a. This Court has made clear that drawing lines for partisan advantage is a race-neutral explanation for district lines, "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). The Legislature's undisputed and race-neutral goals of seeking partisan advantage, protecting the incumbent, and maintaining the incumbent-constituent relationship thus should have precluded any finding of intentional race-based discrimination.

The district court acknowledged, as it had to, that HD54 was drawn to ensure "Republican voting strength," J.S. App. 22a, but it imagined race-based discrimination because a small portion of the City of Killeen, which happened to include some minority voters, was moved to HD55. *Id.* at 21a-22a ("[T]he minority population was intentionally split to ensure Anglo Republican voting strength . . . ."). There is no evidence to support the conclusion that Representative Aycock, let alone the Legislature as a whole, divided the City of Killeen for the specific purpose of harming minority voters. Dividing Killeen in any way would incidentally affect some minority voters because Killeen has a very diverse and integrated population. *Id.* at 15a. But mere knowledge that district lines would exclude some minority voters does not amount to intentional racial discrimination, *Pers.*

Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences."), particularly when the Legislature is entitled to a presumption of good faith, when any decision to divide Killeen could have been challenged on the same grounds, and when the lines were drawn with an undisputed race-neutral purpose to protect an incumbent.

c. The district court also incorrectly suggested that Bell County's House districts must be redrawn to "equaliz[e] population variances . . . previously found to violate one person, one vote principles." J.S. App. 20a. This referenced the district court's advisory finding (in April 2017) that the 2011 Legislature engaged in invidious vote dilution under the one-person, one-vote doctrine because it failed to justify a minor 3.32% population deviation between HD54 and HD55. *Id.* at 269a. That finding has no basis in this Court's one-person, one-vote doctrine or the record in this case, and it cannot be attributed to the 2013 Legislature in any event.

This Court has instructed that, as a general rule, "a maximum population deviation under 10%" constitutes a "minor" deviation that is "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Brown v. Thomson*, 462 U.S. 835, 842 (1983). To be sure, a plan with a deviation below 10% may be challenged, but "attacks on deviations under 10% will succeed only rarely, in unusual cases." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016). To succeed, "those attacking a state-approved plan must show that it is more probable than not that a

deviation of less than 10% reflects the predominance of illegitimate reapportionment factors." *Id.* In short, it is the plaintiff's burden to prove that illegitimate motives predominated; it is not the State's burden to prove that minor deviations reflect permissible motives.

The district court plainly violated *Harris* by shifting the burden of proof to the State. It announced that "deviations may exist, but they must be justified by the right reasons." J.S. App. 241a. It set out to "analyze whether the population deviations in Plan H283 are explained by legitimate legislative policies in ways that justify the challenged deviations." *Id.* at 199a. And it faulted the State because "population deviations were intentionally not minimized beyond 10%, and were not explained or justified on the legislative record during the session." *Id.* at 238a. In the district court's erroneous view, the existence of "unexplained" or "unjustified" deviations was enough to make out a prima facie case of invidious discrimination. That turns one-person, one-vote doctrine on its head.

The district court also made a clearly erroneous finding of fact when it concluded that the deviation in Bell County "resulted from the predominance of the illegitimate use of race to ensure that both districts remained Republican." *Id.* at 271a. There is no question that HD54 was drawn to include Republican voters. But at most, that shows that the district was drawn to protect an incumbent on the basis of partisan affiliation, which correlated with race. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J., principal op.) ("If district lines merely correlate with race because they are drawn on the basis of

political affiliation, which correlates with race, there is no racial classification to justify . . . ."), *cited in Easley v. Cromartie*, 532 U.S. 234, 243 (2001). There is no evidence that "the minority population was intentionally split," J.S. App. 21a, let alone that race predominated.

This is exactly the opposite of an unusual case where a minor deviation shows invidious intent—particularly when the district court itself imposed these districts in 2012. Even if there were some question about the Legislature's motivation in 2011, there is no basis to impugn the Legislature's motivation in 2013, when it adopted the Bell County House districts unchanged from the court-ordered remedial plan.

3. There Is Not and Never Has Been Vote Dilution in Dallas County.

The district court's finding that the 2011 Legislature engaged in intentional vote dilution in three west Dallas County districts—HD103, HD104, and HD105—also fails because there was no vote-dilutive effect. The district court conceded that it was not possible to create additional compact minority opportunity districts in Dallas County. J.S. App. 22a. And the district court also concluded that VRA §2 did not require coalition districts in Dallas County, given that the plaintiffs failed to prove cohesion between African-American and Hispanic voters. *Id.* at 27a. Yet notwithstanding its own finding that there was no vote-dilutive effect, the district court nonetheless found the State liable for intentional vote dilution. That theory of liability—for intentional discrimination that has no discriminatory effect—has no basis in this Court's vote-dilution precedents. *See, e.g., Palmer v.*

Thompson, 403 U.S. 217, 224 (1971) ("motivations" alone cannot "violate equal protection"); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (recognizing a VRA §2 claim based on vote-dilutive effect).

4. There Is Not and Never Has Been Vote Dilution in Nueces County.

a. Finally, the 2011 Legislature could not have engaged in intentional vote dilution in Nueces County because, once again, there was no discriminatory purpose and no vote-dilutive effect. Under the plan that existed in 2010, Nueces County contained two Texas House Districts (HD33 and HD34) and part of a third (HD32), but a relative decline in population entitled the county to only two Texas House districts based on the 2010 Census. *See* J.S. App. 26a. It was therefore not possible to keep the previous configuration in light of the existing population. Consequently, as required by the Texas Constitution's whole-county provision,[6] the 2011 Legislature apportioned two Texas House districts to Nueces County (HD32 and HD34). *See id.* at 27a. One of those two districts was drawn as a Hispanic opportunity district. *Id.* at 57a. That ensured roughly proportional representation: Nueces County Hispanic voters "are around 56% of the relevant population (CVAP)." *Id.* at 51a.

The district court found both intentional vote dilution and vote-dilutive effects in Nueces County, faulting the State for not drawing "an additional compact minority

---

[6] The Texas Constitution requires Texas House districts to be drawn within county lines if possible. TEX. CONST. art. III, sec. 26.

district," *id.* at 54a—that is, "two HCVAP-majority districts wholly within Nueces County," *id.* at 59a. Both the purpose- and effect-based holdings were clearly wrong. As the district court itself recognized, it was not possible to draw two performing minority opportunity districts in Nueces County. *See id.* ("Nueces County had two minority opportunity districts, but they could not be maintained in their benchmark configurations due to population loss."). In fact, the plaintiffs' own attempt to draw two Hispanic opportunity districts within the county resulted in levels of performance for Hispanic-preferred candidates that were "so low as to indicate a lack of real electoral opportunity in both districts." *Id.* at 44a. And the district court rejected the plaintiffs' claim that VRA §2 required the Legislature to violate the whole-county provision in order to create an additional Hispanic opportunity district. *Id.* at 49a-50a, 59a ("[B]reaking the County Line Rule twice to remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires.").

Moreover, the district court recognized that "[c]reating a second district would result in over-representation [of Hispanic voters] in Nueces County." *Id.* at 51a. And it expressly found that "Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election." *Id.* at 55a. The evidence—and the district court's own findings—thus demonstrate that the configuration of Nueces County House districts does *not* dilute Hispanic voting strength. The district court therefore erred by finding, contrary to the evidence, that the configuration

of HD32 and HD34 caused a vote-dilutive effect in Nueces County.

b. The district court also erred when it relied on its previous advisory finding of invidious vote dilution based on a one-person, one-vote violation—a finding made in 2017, but not in its 2012 remedial order. The district court found a one-person, one-vote violation in Nueces County because the Legislature failed to justify a minor 3.63% deviation between HD32 (0.34% below the statewide ideal) and HD34 (3.29% above the statewide ideal). *Id.* at 254a. But the district court cited no authority for finding a one-person, one-vote violation based on the deviation between two districts, as opposed to the maximum deviation in a statewide plan. Nor did the district court cite any authority for shifting the burden of proof to the State to justify a deviation of less than 4%.

The district court's anomalous holding betrays a drastic misunderstanding of this Court's one-person, one-vote doctrine. As explained above, *see supra* pp. 25-26, "attacks on deviations under 10% will succeed only rarely, in unusual cases," *Harris*, 136 S. Ct. at 1307, and the burden lies with the plaintiff to prove that illegitimate motivations predominated.

Relying on one such unusual case, *Larios v. Cox*, the district court faulted the Legislature for assuming that deviations below 10% did not require justification. It stressed that under *Larios*, "deviations of less than 10% are not within a safe harbor," J.S. App. 216a. But the question is not whether the 10% threshold provides a "safe harbor," even if the Legislature thought it did. The question is whether the plaintiffs proved that the plan's

minor deviation resulted predominantly from illegitimate considerations.

The district court answered *that* question in the negative, which should have been the end of the plaintiffs' claims. The court acknowledged that this case is nothing like *Larios* (which involved a 9.98% maximum deviation, 300 F. Supp. 2d at 1326), and it expressly rejected the plaintiffs' claim that the 2011 plan's maximum deviation violated the one-person, one-vote principle. J.S. App. 272a ("Plaintiffs' statewide *Larios* challenge to Plan H283 fails."). Specifically, it found that the 2011 Legislature did *not* manipulate population deviations to systematically disadvantage minority voters or Democratic incumbents. *Id.* at 249a-250a, 272a; *cf. Larios*, 300 F. Supp. 2d at 1329 (finding that the Democratic majority in the Georgia Legislature used population deviations to target Republicans, "primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another"). The State's supposed reliance on a 10% "safe harbor" was therefore inconsequential; the district court held that the 2011 plan's statewide deviation, just below 10%, did not violate one-person, one vote. That is undoubtedly correct.

But the district court erred because it asked the wrong question. In an unprecedented application of one-person, one-vote doctrine, it shifted its focus from the statewide plan to scrutinize minor population deviations between individual districts. Relying on *Brown v. Thomson*, the district court concluded that "the geographic

scope of a one person, one vote claim . . . is whatever the plaintiff makes it." J.S. App. 224a. But *Brown v. Thomson* does not stand for the proposition that plaintiffs may base one-person, one-vote claims on de minimis deviations in discrete geographic areas. In *Brown*, the Court declined to address the constitutionality of a statewide deviation because the plaintiffs only challenged the application of state policy in a single district. 462 U.S. at 846. But that single district was more than 60% below the ideal district population, *id.* at 843-46, which was enough to make out a prima facie case against the entire plan. *Brown* therefore does not support the district court's radical conclusion that States must justify any deviation in any district, no matter how small.

The district court nevertheless found a one-person, one-vote violation in Nueces County because the Legislature failed to justify a deviation of less than 4%. It found that "mapdrawers could have faithfully applied the County Line Rule *and* drawn two districts . . . with roughly equal population." J.S. App. 254a. But because they did not, the court found that the Legislature "intentionally overpopulated HD34 and underpopulated HD32 without legitimate justification in violation of one-person, one-vote principles." *Id.* at 30a. That conclusion is legally erroneous, and it ignores the wider latitude this Court's one-person, one-vote precedents give to population deviations in state legislative (as opposed to congressional) maps. *E.g.*, *Brown*, 462 U.S. at 842.

The district court also assumed, without justification, that a total-population disparity necessarily dilutes voting strength. *See* J.S. App. 225a ("By their very nature,

a plan with population deviations will overvalue voters in underpopulated districts and undervalue voters in overpopulated districts."). This is not necessarily so. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (per curiam), *aff'd*, 543 U.S. 997 (2004) (mem.), which this Court summarily affirmed after *Larios*, the district court rejected a one-person, one-vote claim, despite a pattern of overpopulating "downstate" districts, because those districts were actually systematically *underpopulated* in terms of eligible voters. *Id.* at 369. Here, the district court did not consider whether the disparity in total population caused a disparity in the population of eligible voters or, if it did, which way that disparity cut.

Finally, the district court clearly erred when it assumed that the Legislature must have relied on racial data merely because "HD34 is significantly more Hispanic in population and significantly more overpopulated than HD32." J.S. App. 255a. Relying on "this evidence of the use of race"—which is no evidence at all—it concluded that the Legislature intentionally "dr[ew] the lines in Nueces County to overpopulate the minority district while underpopulating the Anglo district." *Id.* That finding has no support in the record.

III. The District Court's Finding of Improper Race-Based Decisionmaking in HD90 Contravenes This Court's Precedents.

Unlike the other districts invalidated by the district court, HD90 was actually changed by the Legislature in 2013 compared to the 2012 court-ordered map. But the district court's finding of liability in HD90 perfectly illustrates the dilemma that state legislatures face when they

attempt to balance the competing demands of VRA §2 and the Fourteenth Amendment. It also demonstrates the impossibility of avoiding liability under the district court's remove-the-taint theory of intentional discrimination. Under the standards imposed by the district court, the Texas Legislature faced a no-win situation.

The district court found that the 2013 Legislature engaged in racial gerrymandering in HD90 because it relied predominantly on race to maintain Hispanic voting population levels in the district. But even if race had been the predominant motive for the 2013 Legislature's drawing of HD90, the Legislature had the strongest possible reasons to believe that consideration of race was necessary to avoid a VRA §2 violation. The Mexican American Legislative Caucus—a plaintiff in this litigation—expressed a specific concern about reducing the district's Spanish-surnamed voter registration below 50%. J.S. App. 72a. The Legislature responded by configuring the district to ensure that the district's Spanish-surnamed voter registration did not drop below 50%. *Id.* at 75a. Despite that effort to maintain HD90 as a Hispanic opportunity district, another group of plaintiffs *still sued* the State claiming that VRA §2 required the Legislature to add even *more* Hispanic voters to the district. *Id.* at 69a.

In finding that the State's clear effort to avoid a VRA §2 problem did not suffice to justify the use of race, the district court reasoned that "avoid[ing] a potential VRA problem" is just "a vague goal" and "is not a strong basis in evidence that the VRA requires such use of race." *Id.* at 81a. That conclusion is impossible to reconcile with this Court's decisions in *Cooper* and *Bethune-Hill*, and it

is truly extraordinary on these facts. Not only had one plaintiff argued during the legislative process that reducing the Hispanic registered-voter population below 50% in HD90 would result in vote dilution, a different plaintiff *actually brought a claim of vote dilution* despite the Legislature's efforts to maintain that population. Short of a court order that the VRA required a particular district, it is difficult to imagine a stronger basis for a Legislature to believe that it must consider race to avoid liability under the VRA.

The district court's heads-plaintiffs-win, tails-State-loses ruling creates the very situation that this Court's precedents seek to avoid. *See Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802) (The "'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed."). The district court's flawed standard puts the State to an impossible choice—violate the Constitution or violate the VRA—leaving no breathing room at all.

If that were not enough, the district court's analysis of HD90 created a second lose-lose situation for the Legislature. Although the 2013 Legislature reconfigured HD90, the district court concluded that it did not sufficiently remove the "taint" of intentional discrimination by the 2011 Legislature. J.S. App. 83a, 85a ("In Tarrant County, the intentional discrimination previously found by the Court must be remedied, affecting HD90 and HD93."). It reached this conclusion notwithstanding its own finding that the intentional-vote-dilution claim

against the district, as reconfigured in 2013, "fails because of a lack of discriminatory intent." *Id.* at 84a.

In short, the 2013 Legislature substantially redrew HD90; the district court determined that it did not intentionally discriminate; and yet the court still held that the Legislature failed to "remedy" the purported discriminatory intent of the 2011 Legislature. That holding underscores that in the district court's opinion, *absolutely nothing* that the 2013 Legislature did could have cleansed the supposed discriminatory "taint" from the repealed, never-precleared, and never-in-effect maps drawn by the 2011 Legislature. That is not and cannot be the law. Legislatures simply are not required to "cleanse" past reenactments of discriminatory *intent*, and they are certainly not required to scour *court-ordered* remedial maps for the very "taint" that the court itself was under a mandate to eliminate.

CONCLUSION

The Court should note probable jurisdiction or in the alternative summarily reverse.

Respectfully submitted.

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

OCTOBER 2017

RECORD AND BRIEFS

17 626

No. _____

FILED
OCT 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT APPENDIX

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

Library of Congress
Law Library

TABLE OF CONTENTS

Appendix A - Notice of Appeal (August 28, 2017) 1a

Appendix B - Order on Plan H358
(August 24, 2017) 3a

Appendix C - Order on Plan H283
(April 20, 2017) 88a

Appendix D – Opinion Adopting Plan H309
(March 19, 2012) 300a

Appendix E – Order on Plan C235
(August 15, 2017) 316a

Appendix F – Advisory from District Court
re Stay (August 28, 2017) 436a

Appendix G - Constitutional and Statutory
Provisions 437a

Appendix H - Attorney General Letters to
2013 Legislature 440a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' NOTICE OF APPEAL

Defendants the State of Texas, Greg Abbott, in his official capacity as Governor, and Rolando B. Pablos, in his official capacity as Secretary of State, hereby provide notice of their appeal to the Supreme Court of the United States of this Court's Order on Plan H358 (Aug. 24, 2017), ECF No. 1540.

The appeal is pursuant to 28 U.S.C. § 1253, which authorizes direct appeals to the Supreme Court of the United States from a three-judge district court's interlocutory injunctive orders. The Court's August 24, 2017 Order contains an injunction preventing the State from using the existing House Plan H358. *See* ECF No. 1540.

Additionally, an interlocutory order that is not expressly labeled as injunctive but nonetheless has the "practical effect" of granting an injunction may be

appealed as an injunctive order. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). This Order also satisfies *Carson's* "practical effect" test because it prevents the State from using the existing House Plan H358.

Date: August 28, 2017

Respectfully submitted.

KEN PAXTON
Attorney General of Texas
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY D. STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Litigation

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN
Senior Counsel for Civil Litigation
ANGELA V. COLMENERO
Chief, General Litigation Division
MATTHEW H. FREDERICK
Deputy Solicitor General
TODD LAWRENCE DISHER
Special Counsel for Civil Litigation
ADAM N. BITTER
Assistant Attorney General
J. SETH JOHNSON
Assistant Attorney General
ANNE MARIE MACKIN
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-6407
Fax: (512) 474-2697

COUNSEL FOR DEFENDANTS

APPENDIX B

In the United States District Court for the Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN H358

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

This Order addresses Plaintiffs' statutory and constitutional claims against Plan H358, enacted by the 83rd Texas Legislature in 2013.

The following Plaintiffs assert claims against Plan H358: The Texas Latino Redistricting Task Force[1]

---

[1] The Texas Latino Redistricting Task Force "is an unincorporated association of individuals and organizations committed to securing fair redistricting plans for Texas" and includes Hispanics Organized for Political Education ("HOPE"), the Mexican American Bar Association of Texas ("MABA"), the National Organization for Mexican American Rights ("NOMAR"), Southwest Voter Registration Education Project, the William C. Velasquez Institute, and Southwest Workers' Union. Docket no. 891 ¶ 4. The Task Force individual Plaintiffs include Joe Cardenas III, Florinda Chavez, Cynthia Valadez, Emelda Menendez, Alejandro Ortiz, Rebecca Ortiz, Armando Cortez, Gregorio Benito Palomino, Cesar Eduardo Yevenes, Jose Olivares, Tomacita Olivares, Renato De Los

(limited to HD90), MALC,[2] the Perez Plaintiffs,[3] and the NAACP Plaintiffs.[4] At this stage of the litigation, Plaintiffs' remaining claims involve statutory claims under § 2 of the Voting Rights Act ("VRA") and constitutional claims under the Fourteenth Amendment to the United States Constitution.

Santos, Alex Jimenez, Gilberto Torres, Socorro Ramos, and Sergio Coronado. *Id.* ¶¶ 5-20.

[2] MALC is a non-profit Latino legislative caucus established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas. Docket no. 897 ¶ 18. MALC-1 is a list of current MALC members.

[3] Shannon Perez, Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, and TJ Carson. The Perez Plaintiffs have joined with MALC in this phase of the litigation.

[4] The NAACP Plaintiffs include the Texas State Conference of NAACP Branches, an association of local chapters of the NAACP, Howard Jefferson, and Rev. Bill Lawson. Individual Plaintiff Juanita Wallace passed away in 2016. According to the affidavit of Carmen Watkins, Regional Director for Region VI of the National NAACP, the Texas NAACP has well over 10,000 members and members who are registered to vote in almost every county. NAACP-1. She further attests that "the NAACP has at least one branch in each of the implicated counties," 884 members in Tarrant County, 320 members in Bell County, 1,232 members in Harris County, and 147 members in Fort Bend County. *Id.* She further states that she reviewed the official membership lists in each of those counties and determined that there are members who reside in CD9, CD18, CD30, CD33, and House districts 100, 109, 110, and 111 (Dallas County), 95 and 101 (Tarrant County), 54 and 55 (Bell County), and 26 and 27 (Fort Bend County). *Id.*

I. Background and Summary of Claims

Although the Governor called the special session to adopt the Court's interim map H309, some changes were made to the map in Dallas, Tarrant, Harris, and Webb Counties, and the Legislature incorporated those changes into Plan H358. At second reading, Chairman Darby outlined criteria that he would apply in evaluating any proposed amendment:

> that it does not create a harm or a risk to further litigation by violating the constitution's "one person, one vote" principle regarding population deviation; that it does not dilute nor dismantle a Section 2 protected district under the Voting Rights Act or violates the Texas Constitution regarding contiguous districts or the county line rule. If those measures can be satisfied, I want to see that it addresses a concern, for example, the splitting of a community of interest. And finally, I'd like to see an agreement amongst the members affected.

JX-17.3 at S1-2. After three amendments were adopted, Darby stated that they were "small tweaks to districts between members that unite communities of interest and don't have any implications with regard to Section 2 of the Voting Rights Act or the constitution." *Id.* at S5.

The Task Force Plaintiffs bring *Shaw*-type and intentional discrimination/vote dilution claims based on the changes made to HD90 in Tarrant County.

MALC and the NAACP Plaintiffs assert § 2 results claims based on the Legislature's continued failure to draw additional minority coalition opportunity districts in

Harris, Fort Bend, Dallas, and Bell Counties, as shown in their proposed demonstration Plans H391 (MALC) and H392 (NAACP). Defendants maintain their position that § 2 cannot require the creation of coalition districts, but that argument has already been rejected by this Court as inconsistent with binding Fifth Circuit authority. Defendants further contend that these districts are not required by § 2 because Plaintiffs have failed to prove the necessary cohesion among the minority groups included.

MALC also contends that the Legislature was required to draw additional Latino opportunity districts in Nueces County and Midland/Ector Counties. Defendants argue that these districts cannot be required by § 2 because their creation would violate Texas's County Line Rule. This Court has already held that § 2 of the VRA may require the State to break the County Line Rule if § 2 requires the district under the totality of circumstances.

Plaintiffs contend that the intentional discrimination found by this Court in Plan H283 remains in Plan H358, and that Plan H358 was operated or maintained as a device to further intentional vote dilution. This Court's analysis in the Order on Plan C235 concerning the intent of the 2013 Legislature applied to both Plan C235 and Plan H358. Thus, the Court finds that the 2013 Legislature purposefully maintained the intentional discrimination contained in Plan H283 where the district lines remain unchanged or substantially unchanged. The Court will discuss the implications of its prior intent findings in the analyses of the various areas affected.

Last, Plaintiffs assert that the Legislature again acted with intent to discriminate in adopting Plan H358 in 2013 by the Legislature's continued hostility toward minority

districts, pretextual use of the County Line Rule to avoid creating new Latino opportunity districts, and refusal to consider minority coalition opportunity districts, despite the minority population growth. While the Court agrees that the circumstantial evidence remains unchanged in terms of the Legislature's refusal to recognize minority growth due to its continued hostility toward minority districts as perceived Democrat districts, the Court finds that the intentional discrimination in 2013 was limited to the Legislature's intent to maintain and perpetuate (without remedy) any infirmities in the plan that already existed.[5]

II. Analysis by County

The Court thus turns to its analysis of the various claims in each of the specific challenged areas.

A. Harris County

With regard to Plan H283, Plaintiffs asserted a § 2 results claim and intentional discrimination/intentional vote dilution claims. They challenged mapdrawers' failure to draw a new Latino or coalition opportunity district, despite the minority population growth, while protecting slower-growing Anglo districts. They also challenged the elimination of HD149, which they contended was a multi-ethnic coalition minority opportunity district as part of

---

[5] Judge Garcia and Judge Rodriguez adopt the prior fact findings and opinions and incorporate them into this Order because they are relevant to the 2013 plan claims. In this Order, Judge Smith agrees that the Court's orders on the 2011 plans are law of the case. The findings and conclusions in this order are therefore not inconsistent with what this district court panel has already decided.

the Legislature's decision to reduce the number of districts in Harris County from 25 to 24.

In fashioning the interim plan H309, this Court found that Plaintiffs had demonstrated a likelihood of success on the merits of the § 2 claim in eastern Harris County. Specifically, the Court found that Plaintiffs had presented numerous demonstration plans illustrating that an additional compact majority-HCVAP district could be drawn there, and made a preliminary finding that creation of a new Latino opportunity district was justified by the totality of circumstances. Docket no. 690 at 8-9. The Court's interim plan thus reconfigured HD144 in the manner requested by Plaintiffs to have a majority HCVAP. *Id.* The Court also maintained HD149, finding that the § 5 claims were not insubstantial. *Id.*

In its Order on Plan H283, the Court found that Plaintiffs failed to prove intentional racial discrimination with regard to the decision to reduce the number of districts to 24 or the elimination of HD149. Docket no. 1365 at 52-54. However, the Court found that the failure to draw an additional Latino opportunity district in Harris County violated § 2 and was intentionally racially discriminatory. The Court noted that: the member-driven process failed to consider § 2 compliance insofar as minority members were essentially shut out of the process; Hanna's recommendation to consider drawing an additional Latino opportunity district (as he was able to do) was ignored; and when faced with a map that failed to create any new Latino opportunity districts, mapdrawers decided to shuffle minority population within the minority districts to artificially (and without legal basis) inflate the SSVR and HCVAP of existing Latino ability district HD148 to claim VRA compliance, knowing that this was

already a performing Latino district and that no new opportunity district was being created.[6] Docket no. 1365 at 53-57.

During the 2013 legislative session, some changes were made to HD133, HD137, and HD149 and incorporated into Plan H358. These changes were the result of Amendment 3 (Plan H318) offered by Reps. Wu, Vo, and Murphy. On the House floor, Rep. Wu stated that the amendment was agreed to by the three affected members and "swaps out sections of our districts." JX-17.3 at S4. He stated, "One of the main things it does is it helps reintegrate part of a very large Vietnamese population that has very strong language and cultural issues that neither Representative Murphy nor I can really address and are better placed in Representative Vo's district so he can better represent them. This helps make this area more constitutionally sound . . . ." *Id.*; *see also* Tr1525-26. No party complains of these changes.

With regard to Plan H358, MALC[7] asserts § 2 results claims and intentional vote dilution claims based on the intentional failure to create additional coalition opportunity districts.[8] MALC's demonstration Plan H391

---

[6] As discussed in the Opinion on Plan H283, mapdrawers not only used their unjustified increase in SSVR and HCVAP in HD148 to defend their failure to create any new Latino districts in Harris County, they also used it to try to "offset" the loss of existing opportunity district HD33 in bad faith (an attempt that the D.C. Court properly rejected).

[7] The NAACP Plaintiffs do not have a claim for a new minority district in Harris County, but assert that HD149 is protected under § 2 and must be protected in any remedial map. Docket no. 1529 at 61.

[8] It is not possible to draw an additional BCVAP or HCVAP-majority district in Harris County using 2011-2015 ACS data. Tr60 (Korbel).

creates two additional coalition districts—HD132 is a Black + Hispanic CVAP coalition district and HD135 is a Black + Hispanic + Asian coalition district. JX-107; Tr32; MALC-24. Defendants contend that Plaintiffs cannot satisfy *Gingles* because minority groups do not vote cohesively in Harris County, citing the lack of evidence of cohesion in primary elections.

As noted in the Order on Plan C235, the evidence is undisputed that African Americans and Latinos choose primarily to participate in the Democratic primaries in Harris County. The undisputed evidence further shows that Latinos and African Americans are strongly cohesive in support of Democrat candidates in general elections. *See* MALC-22 Table 7 (2014 and 2016 elections). Brischetto characterized African American and Latino cohesion as "extremely high" in general elections. MALC-19 ¶ 64. Dr. Chervenak also found high levels of cohesion between African Americans and Latinos in general elections, with each group cohesively supporting candidates of each race. NAACP-2 Table 5.

As discussed in the Order on Plan C235, however, the evidence indicates a lack of cohesion between African Americans and Latinos in the primaries. Dr. Engstrom's countywide analysis of statewide elections involving Latino and non-Latino candidates indicates lack of Democratic primary cohesion between African-American and Latino voters. African Americans and Latinos shared support for only two of six Latino candidates in Harris County between 2006 and 2010 (both groups also shared a lack of support for candidate Alvarado). Docket no. 307-1 at 16. However, in one case where both groups supported the Latino candidate (Yanez for Supreme Court Place 8), African-American support was only 52.7%

and in the other case (Uribe for Land Commissioner), Latino support was only 59%. *Id.* Table 6. For three Latino candidates, African-American support for the Latino candidate was lower than "others." Docket no. 307-1 at 17-18

Dr. Brischetto did not study any primary elections. Dr. Chervenak did examine the 2016 Democratic primary in HD149 in southwest Harris County, where Asian-American candidate Hubert Vo ran against an African American. He found that a majority of African-American (56.4%) and Latino (60.6%) voters supported Vo. NAACP-2 Table 5A. But Vo also received majority support from Asian (62%) and white (55.4%) voters, meaning that all racial groups supported Vo in the primary, though none at very high levels. *Id.* Further, while HD149 is located within Harris County and is somewhat near (though not adjacent to) proposed tri-ethnic coalition district HD135, it is unclear how voting patterns in HD149 would translate to proposed HD135.

As discussed in the Court's prior orders, there was lay testimony about Hispanic and African-American coalitions in Harris County. And there was lay testimony, such as from Rogene Calvert, Sarah Winkler, Rep. Hubert Vo, and Rep. Sylvester Turner, that Asians, Latinos, and African Americans in Harris County had formed coalitions, though this testimony referred to southwest Houston, farther south than where proposed HD135 would be. Docket no. 1364 ¶¶ 410, 424-27, 451, 460, 503. Rep. Senfronia Thompson provided general testimony that African Americans, Latinos, and Asians work in cooperation together politically in Harris County.

But as it concluded with regard to the proposed congressional districts, the Court finds that there is

simply insufficient evidence of cohesion to show that, when combined, Black and Hispanic voters in proposed HD132 or Black, Hispanic, and Asian voters in proposed HD135 would cohesively support their candidates of choice. Thus, the § 2 results claims in Harris County fail.

To the extent MALC, Perez Plaintiffs, or the NAACP Plaintiffs contend that discrimination found by the Court in Plan H283 remains in Plan H358,[9] the Court rejects such a claim.

No further changes are required in Harris County.

B. Fort Bend County

The NAACP and MALC argued that the Fort Bend County configuration in Plan H283 violated § 2 because it resulted in minority vote dilution, and that an additional minority coalition district was required. Population growth (primarily minority) in Fort Bend County resulted in the addition of a new district there, but no additional minority district was drawn.

The Court considered the NAACP's proposed tri-ethnic coalition district HD26 in Plan H202, but found that the NAACP had failed to establish the *Gingles* preconditions. Specifically, the districts appeared compact, but Plaintiffs had not offered evidence that the minority communities contained within the district were

---

[9] *E.g.*, docket no. 1454 at 41 (stating that it is "unclear whether all the intentional discrimination established by the NAACP and other parties has been adequately remedied"); docket no. 1529 (NAACP Post-Trial Brief) at 62 (the NAACP takes the position that "all the intentional discrimination in Harris County has not yet been remedied").

compact, taking into account traditional districting principles. Docket no. 1365 at 59.[10]

And even if the districts were compact, the Court found that the NAACP offered only lay testimony concerning minority cohesion in Fort Bend County, and the Court would not infer cohesion from other evidence in Harris County. *Id.* at 60. MALC's expert Dr. Brischetto provided the only expert testimony on racially polarized voting in Fort Bend County, and found cohesion among African Americans, Latinos, and Asians and polarized Anglo bloc voting. MALC-161 Table 22. But he only looked at elections in 2012, and he did not conduct a multivariate analysis of the primary elections. Docket no. 1364 ¶ 533.[11]

To support its § 2 results claims in Fort Bend County in this phase of the litigation, MALC offers demonstration Plan H391, which creates a new majority-minority Black+Hispanic+Asian district HD26. Tr30; MALC-24. Plan H391 redraws HD26, HD27, HD28, and HD85 in the "Fort Bend Mix" of Fort Bend, Jackson, and Wharton Counties, and is set up to be plugged into Plan H358.

---

[10] The Court declined to consider MALC's Plans H329 and H366 because these plans were first introduced during the 2013 legislative session and were more properly considered as part of the 2013 plan case. Docket no. 1365 at 60.

[11] In his 2014 Supplemental Report, Dr. Alford noted that Dr. Brischetto found that in Fort Bend County, Asian voters supported Democrats in the general election at an average of only 60%. Alford 2014 Supp. Report at 17. Hispanic support was 72.2%, while Black support was 97.8%. MALC-161 Table 25. Dr. Alford further highlighted the lack of evidence of cohesion in the primaries, and predicted based on minority voter behavior in other areas that these groups would not be cohesive in the primaries. Alford 2014 Supp. Report at 21-22.

MALC-17 (Korbel 2017 Report) ¶ 26. MALC's expert George Korbel drew the plan, and he states that HD26, HD27, and HD28 are essentially located in suburban Houston areas, the districts are simplified, the split of the City of Richmond is eliminated, and the adjacent cities of Rosenberg and Richmond are combined in HD85. *Id.*

NAACP offers demonstration Plan H392, which creates tri-ethnic coalition district HD26, and Dr. Fairfax's testimony regarding compactness. County Commissioner Grady Prestage also testified to the compactness of proposed HD26. Tr567-68. The Court agrees that NAACP's proposed HD26 is compact and satisfies the first *Gingles* precondition of numerosity when all the groups are combined.

NAACP Plaintiffs offer the expert testimony of Dr. Chervenak to show racially polarized voting. NAACP-2 Table 4. He examined 2012, 2014, and 2016 general elections in HD26, finding in each case that African Americans, Latinos, and Asians were cohesive in support of the minority candidate, while non-Hispanic whites were strongly polarized against those candidates (with support never exceeding 13%). *Id.* Dr. Chervenak testified that there had not been a contested Democratic primary in HD26 for many years. Tr422. The NAACP Plaintiffs argue that this demonstrates that voters of color are not acting in opposition to each other, and each group supports the minority candidates in the general election. They further contend that lay witness testimony supports a finding of cohesion, citing Commissioner Prestage's testimony about K.P. George (Fort Bend ISD Trustee), Neeta Sane (HCC Board of Trustees), and Q Imam (Sugarland City Council). Tr557-58.

The State contends that Plaintiffs cannot satisfy *Gingles* because there is no evidence of cohesion among Asian-American, Black, and Hispanic voters in Fort Bend County. Docket no. 1526 at 63. They note that Plaintiffs' experts did not analyze primary elections, that Dr. Murray testified that Asian-American voters in Fort Bend County tended to split their vote almost evenly between Democrats and Republicans,[12] and that lay witness testimony failed to show cohesion within the Asian population. Defendants also cite the testimony of Jacey Jetton, who testified that Asian Americans are not cohesive among themselves, with South Asian voters and Chinese voters differing in preference, Tr699, and the testimony of Commissioner Grady Prestage, who also confirmed that the Asian-American community is not "monolithic." Tr581-82.

NAACP Plaintiffs argue that the Latino community is also not monolithic, but "that does not negate their ability to obtain fair representation under the Voting Rights Act." Docket no. 1529 at 56. However, the lay witness and expert witness evidence indicates that national origin subgroups within the Fort Bend Asian community[13] may have distinct political preferences such that they cannot all be considered together in determining cohesion. Jetton testified that the Asian community did not necessarily vote cohesively, citing instances where the South Asian and Chinese communities had differed. Tr699-701.

---

[12] Tr1274-75 (Asians were between 45 and 55% Republican); Tr1288 (Asians in Fort Bend County are more Republican than nationally).

[13] Commissioner Prestage noted that the Asian population in Fort Bend County includes South Asian (Indians and Pakistanis), Chinese, and Vietnamese. Tr562.

Though Jetton's testimony was not particularly compelling for several reasons, Dr. Murray also stated that "you really need to look at national origin groups in Fort Bend County, because the South Asians are much more Democratic and have been since – a lot of them since 2001, too. So it's complicated communities, and to lump them all together is somewhat problematic in terms of analysis." Tr1290. He contrasted this with Latinos in Texas, which he said are mostly of Mexican origin, which "simplifies things a lot." *Id.*

Further, there is evidence that Latinos are not cohesive with other minorities in their choice of primaries. In his 2014 report, Dr. Brischetto found that more Latino voters in Fort Bend County chose to participate in the Republican primary (2.758) in 2012 than in the Democratic primary (576). MALC-161 Table 21. This was also true in 2010, where 2,176 Hispanics chose to participate in the Republican primary, while only 1,305 participated in the Democratic primary. Joint Expert Ex. E-3 (Lichtman Report) at 5 (Table 1). In 2008, however, 9,252 Hispanics chose the Democratic primary, while only 2,715 chose the Republican primary. *Id.*

Based on his general election analysis, Dr. Brischetto noted "severe" racial bloc voting between Anglos and African Americans, between Anglos and Hispanics, and between Anglos and Asians in Fort Bend County, and concluded that "[t]here is clearly a tri-ethnic coalition in support of Democrats in the general election" in Fort Bend County. MALC-161 ¶¶ 89, 91. However, he noted that "[v]oter cohesion among Asian American voters for Democrats in general elections is . . . considerably lower (60%) in Ft. Bend. In some of the contests, however, the Asian point estimates are not reliable." *Id.* ¶ 89. The mean

vote for Latinos was 72.2% and for African Americans it was 97.8%, compared to Anglo support of 5.9%. *Id.* at Table 25. Dr. Brischetto did not analyze any Fort Bend County elections in his 2017 report.

Considering all the evidence, the Court finds that Plaintiffs have failed to prove minority group cohesion sufficient for their § 2 results claims based on triethnic minority coalition districts in Fort Bend County.

The Court previously rejected the NAACP's intentional vote dilution claim concerning Fort Bend County for insufficient evidence. The NAACP continues to pursue its intentional vote dilution claim in Fort Bend County, arguing that the county is reportedly the most diverse in the country, and thus the minimization of minority voting strength, with only one of four districts having a representative of color, is circumstantial evidence of an intent to discriminate against voters of color. Docket no. 1529 at 52. In addition, the NAACP offers racial density shading maps to show that minority communities are cracked in the districts' configuration, with HD26 fragmenting a high-density Asian-American population in Sugarland and a substantial Asian-American population in the Four Corners and New Territory region. *Id.* The NAACP notes that County Commissioner Gary Prestage confirmed how Plan H358 fractures Asian-American communities, and the oddly shaped appendages reach out to grab predominantly white pockets of voters, in complete disregard for city boundaries and compactness.

The NAACP does offer circumstantial evidence of intentional vote dilution—minority communities are split, and the result is a lack of proportionality of representation (in 2010 Fort Bend County was 36.2%

Anglo, yet only one district has a representative of color). And the HD26 configuration is bizarre, but some explanations were given for the districts' shapes, and Plaintiffs have failed to prove discriminatory intent as opposed to discriminatory effects. Plaintiffs' shading exhibit shows an Asian community in Meadows Place is cracked, but there was evidence that Rep. Reynolds wanted population to the north, which could account for that cracking (the specifics of this possibility were not explored). In addition, mapdrawers offered race-neutral explanations for some of the bizarre shape of HD26. The Court maintains its finding that Plaintiffs have not shown intentional vote dilution in the Fort Bend County configuration.

No changes are required in Fort Bend County.

C. Bell County

In the prior phase of litigation, MALC, the Perez Plaintiffs, and the NAACP Plaintiffs asserted § 2 results and intentional vote dilution claims in Bell and Lampasas Counties. The Court found no § 2 results violation in Plan H283, noting that Plaintiffs' proposed districts combined three or four different minority groups but Plaintiffs lacked the necessary evidence of such multi-ethnic cohesion. Docket no. 1365 at 75. The Court also found that, considering all the evidence, the Legislature's intentional failure to create the proposed districts was not intentional vote dilution. *Id.*

However, the Court found evidence that mapdrawers (specifically Anglo Republican HD54 incumbent Aycock) intentionally racially gerrymandered the district by cracking minority population, thus diluting the minority vote to ensure Anglo control over both remaining

districts. Rather than respecting the boundaries of the City of Killeen, which included significant minority population and had been mostly within HD54 in the benchmark, he and mapdrawers split the City to divide its minority population. Plans were introduced by minority members that would have kept the City more whole, but they were rejected. Rep. Aycock, who drew the configuration, offered unconvincing and pretextual explanations for the split (such as that portions of the Killeen community were more of a community of interest with Lampasas than with the remainder of Killeen), leading the Court to find that the decision to split Killeen and the minority community within it (removing minorities from HD54 and moving in Anglos) was to ensure that HD54 and HD55 remained Anglo-majority and to make HD54 less likely to perform for minority voters.[14]

---

[14] The Court also relied on evidence of racially polarized voting in Bell County. Anglos make up 55% of the adult population in Bell County, African Americans 21%, Latinos 19%, and Asians/Others 5%. MALC-161 ¶ 70. Dr. Brischetto conducted a multivariate analysis and found that, in each of the three federal elections, "there were clear patterns of severe polarization between Anglo voters, on the one hand[,] and Latino, African American voters, and Asian voters, on the other." *Id.* ¶ 73. On average, more than 9 in 10 Anglos preferred the Republican candidate while at least 8 in 10 Latinos and Asians and about 9 in 10 African Americans supported the Democrat. *Id.*

In the 2012 HD54 election, Anglos supported Anglo Republican Jimmie Don Aycock at 88.81%, while none of the minority groups supported him (19.13% Latino support, 6.77% African-American support, and 29.9% Other (Asians) support). *Id.* Table 19. All three minority groups supported African-American Democratic candidate Brown (80.87% Latino support, 93.23% African-American support, and 70.1% Other/Asian support). *Id.* In the race for Bell County Sheriff, Anglo support for the Anglo Republican candidate was

The Plan H283 configuration of Bell and Lampasas Counties remains unchanged in Plan H358. The NAACP Plaintiffs, MALC, and the Perez Plaintiffs continue to assert § 2 results and intentional vote dilution claims. *E.g.*, Docket no. 897 (MALC) ¶ 54 (Plan H358 "unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections"). They contend that the violations found by this Court concerning Plan H283 remain in Plan H358.

The NAACP Plaintiffs offer Plan H392, which draws HD54 as a 30.3% Black Alone CVAP and 20.9% HCVAP coalition district, and the expert testimony of Dr. Fairfax to show compactness. JX-108.3; Tr972 (Fairfax). MALC and Perez Plaintiffs offer Plan H391, which draws HD54 as a 30.1% Black Alone CVAP and 20.4% HCVAP coalition district. JX-107.3. Plan H391 reunites the City of Killeen in proposed minority opportunity district HD54, respecting municipal boundaries and creating a compact district, while also equalizing population variances this Court previously found to violate one person, one vote principles. Tr20 (Korbel). These districts satisfy *Gingles'* numerosity requirement as a coalition. Both are also compact, especially MALC's district in Plan H391.

However, Defendants contend that Plaintiffs cannot satisfy *Gingles* 2 because Plaintiffs did not establish that Black and Hispanic votes in Bell County are cohesive. Although Dr. Brischetto found racially polarized voting in Bell County in the 2012 general elections he analyzed,[15] he

---

90.43%, while Latinos (85.81%), African Americans (97.35%), and Others/Asians (87.59%) voted for the Latino Democrat. *Id.* & ¶ 75.

[15] In his 2014 report, Dr. Brischetto found racially polarized voting in Bell County. MALC-161 Table 19. He found "[t]here is

did not analyze any Bell County elections from 2014 or 2016. Dr. Chervenak analyzed general elections in 2012, 2014, and 2016 and found racially polarized voting, but did not analyze primaries.[16] And Defendants contend that Plaintiffs' lay witness testimony does not provide a basis for finding cohesion.

The Court found that the lines in Bell County were drawn with a racially discriminatory purpose, and that the minority population was intentionally split to ensure

---

clearly a tri-ethnic coalition in support of Democrats in the general election in the two counties where African American and Asian American voters were separated in the analyses [Bell and Fort Bend Counties]. Latino, Black and Asian voters are supporting Democrats, regardless of the race of the candidate." *Id.* ¶ 89. He also found "clearly cohesive bloc voting among Anglo voters, found to be very solid in Ft. Bend and Bell counties, where Black and Asian voters are separated in the analyses. On the average, 95% of the Anglos in those counties supported the Republican candidates in the general election." *Id.*

[16] Dr. Chervenak conducted a racially polarized voting analysis for six general elections within Bell County in 2012, 2014, and 2016. NAACP-2 Table 1. He found strong cohesion (93.4 to 97.6%) among African-Americans supporting African-American candidates in both district and statewide elections, and African-Americans also strongly supported Latino candidates in the general elections (93.6 to 98.9%). Similarly, he found cohesive Latino support for Latino candidates (82.9 to 89.9%) and for African-American candidates (82.9 to 88.6%). "Other" voter support for Latino or African-American candidates never came close to a majority (13.2 to 18.3%). In the 2012 HD54 general election, African Americans gave 95.1% support to African-American candidate Brown, Latinos gave 88.6% support, and other voters gave only 18.3% support. Thus, Dr. Chervenak found, the district (HD54) and statewide elections reveal a high level of racial polarization, with African Americans and Latinos cohesive in support of both African-American and Latino candidates, while minority preferences were not shared by other voters.

Anglo Republican voting strength in both districts in the area. That intent and harm remain in Plan H358 and must be remedied. Although Defendants argue that any intentional discrimination claim fails due to the lack of evidence that any legislator acted with a racially discriminatory purpose in voting for Plan H358 in 2013, the Court has found that the 2013 Legislature intended to continue the intentional discrimination found in Plan H283.

The Court need not decide whether Plaintiffs have proven that a coalition minority district is required under the § 2 results test. Defendants conceded during the interim map phase, with respect to DFW and CD33, that an appropriate remedy for cracking a minority population would be to reunite that population.[17] As noted, Killeen was mostly whole in Plan H100 but its minority population was then intentionally split to minimize minority voting strength. As a possible remedy, MALC's Plan H391 reunites the City of Killeen and its minority population.

Plaintiffs' intentional discrimination/vote dilution claims have merit, and a remedy is required in Bell County.

D. Dallas County

In Dallas County, the Court rejected the NAACP Plaintiffs' § 2 results claims with regard to Plan H283 because they failed to meet their burden under *Johnson v. De Grandy* to show that Plan H202 contained more compact opportunity districts than Plan H283, and found

---

[17] Because the reunited population is not being purposefully drawn into a minority coalition district for § 2 purposes, evidence of cohesion in the primaries is unnecessary.

that the remaining § 2 results claims were best addressed in the 2013 plan case. Docket no. 1365 at 62 n.49. And while the Court did not find racial gerrymandering or intentional vote dilution in eastern Dallas County, it did find an improper use of race to dilute Latino voting strength in western Dallas County. Specifically, the Court found that mapdrawers improperly used race to make HD103 and HD104 more Hispanic and HD105 more Anglo to protect an Anglo Republican.

The Court's interim Plan H309 did not alter the Dallas County configuration from Plan H283. However, during the 2013 legislative session, some changes were made to HD103 and HD115 through an agreed amendment (Amendment 2, Plan H324) proposed by Rep. Anchia (HD103) and Rep. Ratliff (HD115). Anchia testified that the change was requested by Rep. Ratliff, and Anchia wanted to accommodate him to maintain good relationships. Tr131-133. The amendment swapped some population between the two districts. On the House floor, Rep. Villalba explained that Rep. Anchia would receive the entire community of Farmers Branch in exchange for keeping together the Carrollton Community in HD115. JX-17.3 at 4. Chairman Darby testified (as he also stated on the House floor) that the amendment also "helped the [population] deviations." Tr1525; JX-17.3 at 6 ("Anchia was way over the deviation, and Bennett Ratliff's district was way under. What that did—what this amendment did was help bring those deviations back into line."). No party complains about these changes.

The NAACP Plaintiffs, MALC, and the Perez Plaintiffs assert results and intentional vote dilution claims under § 2. Plaintiffs contend that certain violations found by this Court concerning Plan H283 remain in Plan

H358, specifically this Court's findings concerning HD103, HD104, and HD105 in western Dallas County. NAACP Plaintiffs continue to assert "that minority voters across the county, not just in the western part of the county, were intentionally cracked and packed" beyond those identified areas. Docket no. 1529 at 58.

For the § 2 results claim, MALC's Plan H391 proposes four new minority-majority CVAP coalition districts in Dallas County. Tr31; JX-107; MALC-24. HD102 and HD107 would be Black + Hispanic coalition districts, and HD105 and HD113 would be tri-ethnic coalition districts including Asians.

NAACP Plaintiffs assert that Plan H392 "presents a configuration that corrects [the] intentional discrimination [found by the Court in Plan H283], and when the districts are drawn fairly, three additional majority-minority districts naturally occur, reflecting the population present in those areas." Docket no. 1529 at 58. Those districts are HD105 in western Dallas County, and HD102 and HD107 in eastern Dallas County. All three districts are Black + Hispanic coalition districts, though HD105 and HD102 are Hispanic-plurality districts and HD107 is a black-plurality district. NAACP Plaintiffs contend that lay expert testimony demonstrates that the proposed districts are compact. They assert that these districts are required by § 2 and to remedy the intentional discrimination across Dallas County.

Whether § 2 requires these districts again boils down to whether minority voters in the proposed districts are politically cohesive. Plaintiffs assert that they have established racially polarized voting through expert and lay witness testimony. The evidence discussed in the Opinion on Plan C235 is equally relevant here. Dr.

Chervenak examined six elections in Dallas County. NAACP-2 Table 2. His multivariate analysis revealed racially polarized voting—African Americans and Latinos are cohesive in support of African-American and Latino candidates, while other voters did not share the candidate preferences of African-American and Latino voters. In the 2016 general election for HD107 in Dallas County, Dr. Chervenak found Latinos (83.8%) and African Americans (87.5%) were cohesive in their support of Neave, while Anglos gave only 41.1% support. *Id.*

Dr. Brischetto found racially polarized voting in the five general election contests in 2014 and 2016 that he analyzed—African Americans and Latinos voted cohesively in support of three Latino Democratic candidates and Anglos were cohesive in their lack of support; Anglos gave 64 and 69.4% support to the Latino Republican candidate, while African Americans and Latinos did not support those candidates. MALC-19 Table 5. Thus, "[i]n all five of these contests, African American and Latino voters were supporting the same candidates and opposing the candidates preferred by Anglo voters. The degree of cohesiveness in voting between African Americans and Latinos was extremely high in Dallas County." *Id.* ¶ 50. Plaintiffs also cite to the testimony of Rep. Eric Johnson from Dallas, who stated that African-American voters were strongly supportive of Latino House representatives currently serving in the areas encompassed in HDs 103, 104, and 105. Tr520-21.

Dr. Engstrom's analysis of general elections also found strong cohesion between African Americans and Latinos in support of the Democratic candidate, with Anglo voter support in the 20-30% range. Docket no. 307-1 Table 5. But Dr. Engstrom's analysis of primaries found

that African Americans were "the least likely group to support Latino candidates in Democratic primaries." *Id.* at 15 (African American support was lower than "Other" support in six of eight primaries); *see also id.* Table 5.

Defendants note that Korbel did not consider primary cohesion when he drew the districts and did not offer any opinion on cohesion, and that MALC's expert Dr. Brischetto did not look beyond general elections. They further note that NAACP expert Dr. Chervenak did not examine primary elections in Dallas County and could not make any statements about the characteristics of Latino, African American, or Asian American candidates of choice. Tr443-45. Further, Defendants assert, to the extent the record contains any evidence regarding cohesion, it shows that Black and Hispanic voters are not cohesive.

Considering all of the evidence, the Court finds, as it did in the Order on Plan C235, that Plaintiffs have failed to demonstrate the necessary cohesion for their § 2 results claims in Dallas County.

However, the Court finds that the intentional discrimination it found in western Dallas County in Plan H283 still exits in Plan H358. H309 made no changes to Dallas County. Although some changes were made in H358, these did not remove or remedy the intentional discrimination.

Accordingly, changes are necessary in Dallas County to remedy the intentional discrimination previously found by the Court in HD103, HD104, and HD105.

E. Nueces County

MALC challenges the configuration of districts in Nueces County under § 2 and the Fourteenth Amendment. As discussed in the Court's opinion on Plan H283, it is undisputed that Nueces County had two benchmark Latino opportunity districts (HD33 and HD34, though both failed to elect Latino-preferred candidates in 2010) and part of a third district (HD32) represented by Anglo Republican Todd Hunter. Because Nueces County grew at a slightly slower rate than the statewide average, all three districts were underpopulated compared to the 2010 county population ideal. The 2010 census population entitled Nueces County to almost exactly two (2.02) districts under the County Line Rule. During the 2011 redistricting process, mapdrawers chose to eliminate one of the Latino opportunity districts (HD33) and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect incumbent Hunter.

Although the HCVAP of Nueces County was above 50%, mapdrawers did not look into whether two majority-HCVAP Latino opportunity districts could be maintained in Nueces County, either wholly within the County or by breaking the County Line Rule, despite advice from David Hanna of the Texas Legislative Council to consider those options. Instead, they relied on countywide SSVR (which was below 50%) to assert that it was mathematically impossible to draw two Hispanic districts wholly within the County, and they categorically refused to consider breaking the County Line Rule to comply with the VRA.

They then tried to offset the § 5 retrogression caused by the loss of HD33 by increasing the SSVR of two districts that were electing Democrats, HD90 and HD148, even though, as the D.C. Court held, these were already ability districts.[18] They did not consider whether § 2 required two Latino opportunity districts in Nueces County because, they believed, increasing the number of majority-SSVR (in Interiano's view) or majority-HCVAP (in Downton's view) districts statewide also precluded that claim. Thus, as this Court previously concluded, the motive for increasing the SSVR in HD90 and HD148 was not to increase Latino electoral opportunity in the spirit of the VRA, but to undermine Latino voting strength statewide by attempting to mask the loss of HD33 and preclude § 2 results claims.

Although Plaintiffs challenged the Nueces County configuration in Plan H283, this Court did not alter the districts in Plan H309. The Court lacked the benefit of the full record in making its preliminary determinations. Thus, at the time, the Court also focused on SSVR rather than HCVAP.[19] Further, the Court concluded that the loss of HD33 for § 5 purposes was offset by the new Latino

---

[18] As noted below in the discussion of Tarrant County, the Task Force contends in this phase of the litigation that HD90 did need an increase in HCVAP/SSVR to allow Latinos to control the Democratic Primary. Even if that is true, that was not the basis for the Legislature's actions in increasing HD90's SSVR in 2011.

[19] A review of the full record indicated that HCVAP data was available to mapdrawers before the map went to the floor, that the HCVAP of Nueces County was comfortably above 50% in 2010, that it had been above 50% since the last census in 2000, and that mapdrawers were aware of these facts, yet continued to focus on SSVR because it was below 50%.

opportunity district HD144 in the interim map. The Court could not conclude, at that time, that plaintiffs were likely to succeed on their § 2 claim because it appeared that the only way to maintain two Latino districts in Nueces County was to cut a county line, which seemed inappropriate absent a § 5 violation (which existed in Plan H283 but not H309). But the Court did not rule out a conclusion that the VRA could require a county line cut:

> This is not to say that Section 2 of the VRA could never require a county line cut. This Court can envision a situation in which the refusal to cut a county line could, even in the absence of discriminatory purpose, result in vote dilution. However, in the particular circumstances of this case, traditional redistricting principles counsel in favor of maintaining two districts in Nueces County.

Docket no. 690 at 8.

During the 2014 trial, the Task Force Plaintiffs argued for the first time that two HCVAP-majority districts could be drawn wholly within Nueces County, but did not offer a demonstration map with such districts. The Court found that consideration of the § 2 results claim concerning Plan H283 was premature because, while mathematically two HCVAP-majority districts could be drawn in the area, no Plaintiff demonstrated whether or not two *Gingles*-compliant districts could have been drawn wholly within the County,[20] and it was improper to

---

[20] No Plaintiff submitted a proposed map or other information to support the *Gingles* preconditions for such a map.

consider whether § 2 required a County Line Rule violation in Nueces County until that issue was decided.

However, this Court did find evidence of intentional vote dilution in the Legislature's refusal to consider whether the VRA required HD33 to be preserved and its attempted offset for the elimination of HD33 (described above) and also in the configuration of remaining HD32 and HD34. Docket no. 1365 at 37-40. The Court found that HD32 and HD34 were racially gerrymandered to dilute Latino voting strength and protect Anglo incumbent Hunter. HD34 was intentionally packed with Hispanic voters, Hunter intentionally drew out potential Hispanic rivals (both Republican and Democrat), and Hunter intentionally overpopulated HD34 and underpopulated HD32 without legitimate justification in violation of one-person, one-vote principles. The Nueces County configuration remains unchanged in Plan H358, and MALC asserts § 2 results and intentional vote dilution claims.

Standing

Although Defendants have not raised the issue, these claims require us to determine whether MALC has standing. MALC's standing argument in Nueces County centers on Raul Torres, a registered voter in current HD34 and a former Texas House representative and MALC member from HD33, the eliminated Nueces County Latino opportunity district. MALC argues that it has organizational standing "to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In this respect, MALC argues that its organizational strength and membership

depend on growth, but that Plan H358 impedes this purpose by eliminating MALC member Torres and preventing potential MALC members from being elected. Docket no. 1462 at 5.

Separately from its argument on organizational standing, MALC asserts that it has associational standing, which requires that an individual MALC member have standing to sue in his or her own right. Docket no. 1462 at 2. To support this requirement, MALC points again to Torres, who "at the time of the filing of this action and the initial redistricting, had his district completely eliminated and was then paired with Anglo Republican Representative Connie Scott." *Id.* at 3.[21]

The general elements of standing are well established:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or

---

[21] MALC briefly asserts a third independent argument for standing in Nueces County (and other areas): "MALC also relies on the standing of co-Plaintiffs LULAC and NAACP in the areas of [Nueces County and others], all of whom are seeking the same relief. *See e.g. Ruiz v. Estelle*, 161 F.3d 814 ([5th Cir.] 1998)." Docket no. 1462 at 5 n.1. MALC contends *Ruiz* supports the proposition that "intervenors and similarly situated litigants may not independently require standing if one co-litigant has standing and the intervenor or co-litigant is seeking the same relief." *Id.* Even assuming *Ruiz* can be read this broadly and extends beyond the intervenor context to cover "similarly situated litigants" more generally, this argument fails because neither LULAC nor the NAACP is similarly situated with MALC in Nueces County—MALC is the only plaintiff challenging the configuration of Nueces County in Plan H358.

> imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted) (most alterations original).

There are two main types of standing for entities such as MALC. First, through organizational standing, "an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth*, 422 U.S. at 511. Organizational standing is to be distinguished from associational standing (more descriptively termed representational standing) through which "[a]n association has standing to bring suit *on behalf of its members* when [1] its members would have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) (emphasis added).

The Court agrees that MALC has organizational standing, and alternatively, that MALC has associational/representational standing.

organizational standing

The Supreme Court in *Warth*, by simply recognizing that an organization may seek judicial relief from an injury to the organization itself, articulated what is often cited as the origin of organizational standing. 422 U.S. at 511. Several years later, the Supreme Court refined this concept by deciding the seminal case on this topic, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The relevant portion of *Havens* dealt with the standing of an organization—Housing Opportunities Made Equal ("HOME")—to bring racial steering claims against a realty company under the Fair Housing Act. *Id.* at 378-79. Relying partly on *Warth* to conduct "the same inquiry as in the case of an individual," the Supreme Court looked to the following allegations from HOME's complaint regarding its expenditures of resources to determine whether HOME alleged a sufficient injury:

> "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices."

Id. at 379 (internal citations to HOME's Complaint omitted). The Supreme Court held that the district court improperly dismissed for lack of standing:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there

> can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.

Id.

Beyond this main holding, the Supreme Court made two noteworthy comments. First, the Court contrasted its finding that these allegations exceeded a simple setback to HOME's abstract interests with prior case law holding that a mere interest in a problem could not support organizational standing. *Id.* at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). Second, the Supreme Court noted that HOME was not deprived of standing simply because its injury was noneconomic. *Id.* at 379 n.20.

The Fifth Circuit has applied this concept of organizational standing on many occasions, helping define its boundaries by focusing on whether a plaintiff's alleged injury is sufficiently concrete and traceable to the defendant's conduct. In *Louisiana ACORN Fair Housing v. LeBlanc*, the Fifth Circuit recognized that an organization's redirection of "some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." 211 F.3d 298, 305 (5th Cir. 2000). But outside of costs expended pursuing litigation, an organization will have organizational standing if it "prove[s] a drain on its resources resulting from counteracting the effects of the defendant's actions."

Id.; *ACORN v. Fowler*, 178 F.3d 350, 356-62 (5th Cir. 1999).

In *Fowler*, the court addressed the standing of a voter advocacy organization to force state compliance with the National Voter Registration Act ("NVRA"). 178 F.3d at 356-62. The court concluded that neither litigation costs nor expenditures made to monitor state compliance with the NVRA supported organizational standing because these injuries were not fairly traceable to the state. *Id.* at 358-59. But for some claims, the court found that the organization had standing based on its voter registration activities, the cost of which increased out of a need to "counteract[ ] the effects of [the state's] alleged failure to implement [the NVRA]." *Id.* at 360-61; *see also Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (affirming a district court's finding of standing for the Louisiana NAACP because the head of its voter registration efforts personally conducted registration drives to counteract a state's alleged noncompliance with the NVRA, even though the NAACP itself may not have spent any money to conduct these drives).

Still, not all diversions of resources counteracting a defendant's conduct establish an injury in fact. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 238-39 (5th Cir. 2010). In *City of Kyle*, the court concluded that organizations had not suffered an injury in fact arising from a city's new housing ordinances where they failed to explain how their activities, "which basically boil[ed] down to examining and communicating about developments in local zoning and subdivision ordinances, differ[ed] from [their] routine lobbying activities." *Id.* at 238. Further, the court considered the plaintiffs' failure to identify specific projects that were delayed or curtailed as a result of

resources being diverted to the challenged ordinances. *Id.* The court characterized the plaintiffs' alleged injuries as simple setbacks to the organizations' abstract interests rather than perceptible impairments to their abilities to carry out their purposes, despite the fact that the plaintiffs commissioned a $15,000 study on the impact of the challenged ordinance. *Id.* at 238-39.

The Fifth Circuit has also indicated that a conflict between the defendant's conduct and the organization's mission is necessary but not sufficient to establish organizational standing. *Fowler*, 178 F.3d at 361-62 ("[U]nless it [is] clear that an organization's stated goals [are] 'at loggerheads' with a defendant's conduct, 'it is entirely speculative whether the defendant's conduct is impeding the organization's activities.'" (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429-30 (D.C. Cir. 1996)). This requirement was satisfied in *Fowler* where the voter advocacy organization's purpose of increasing the political power of low and moderate income people was at odds with the state's alleged failure to facilitate voter registration. *Id.*

This Court is aware of no redistricting case in which an organizational plaintiff has based its standing on an injury to itself, as described in *Havens*. Nor is this Court aware of any redistricting decisions rejecting such a theory. But while *Havens* and many other decisions on organizational standing deal with the Fair Housing Act, nothing in *Havens* limits organizational standing to such challenges. Indeed, as noted above, the Fifth Circuit and other courts have extended this concept of organizational standing beyond the housing context. *E.g.*, *Fowler*, 178 F.3d at 356-62 (the NVRA); *Schedler*, 771 F.3d at 836-37 (same); *Georgia State Conference of N.A.A.C.P. v. Kemp*,

841 F. Supp. 2d 1320, 1336-37 (N.D. Ga. 2012) (same). Most importantly for present purposes, despite not dealing specifically with redistricting claims of the type asserted in this case, courts have consistently found standing under *Havens* for organizations to challenge alleged violations of § 2 of the VRA and the Fourteenth Amendment.

A majority of the Supreme Court has accepted this approach in the § 2 context. In *Crawford v. Marion County Election Board*, the Seventh Circuit found that the Indiana Democratic Party had organizational standing to assert § 2 and Fourteenth Amendment claims against an Indiana voter ID law because it "injure[d] the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote. *See Havens*[, 455 U.S. at 378]." 472 F.3d 949, 951 (7th Cir. 2007). Subsequently, a splintered Supreme Court affirmed the Seventh Circuit's grant of summary judgment against the plaintiff's claims on the merits. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 188-89 (2008). In doing so, five justices across two opinions explicitly approved of the Seventh Circuit's standing analysis. *Id.* at 189 n.7 (Stevens, J., joined by Roberts, C.J., and Kennedy, J., announcing the judgment of the Court); *id.* at 209 n.2 (Souter, J., joined by Ginsburg, J., dissenting).

Other circuit and district courts have unanimously reached similar conclusions on organizational standing for § 2 and Fourteenth Amendment claims. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017) (finding organizational standing to bring § 2 and Fourteenth

Amendment claims against a state law restricting absentee ballots and in-person voting assistance because the organization planned to expend resources to counteract the law's effect on the African-American community). In one case, for example, the Democratic Party of Virginia alleged § 2 and Fourteenth Amendment claims against a Virginia voter ID law. *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 575-76 (E.D. Va. 2015), *on reconsideration*, 3:15CV357-HEH, 2016 WL 6921611 (E.D. Va. Feb. 2, 2016). At the pleadings stage, the district court found that the Party sufficiently alleged its organizational standing based on expected expenditures of additional resources and longer lines at polling places. *Id.* at 579. The court added that the Party also "claim[ed] direct injury to its raison d'être—electing candidates who support the democratic platform, as opposed to the individualized interests of its members." *Id.* at 578.

Following a trial, the court found that the Party proved its standing and its injury, "primarily in the form of diversion of time, talent, and resources to educate their voters and implement the requirements of the Virginia voter identification law." *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 584 (E.D. Va. 2016). Without mentioning standing, the Fourth Circuit affirmed. 843 F.3d 592 (4th Cir. 2016).

The only case indicating a contrary result is *Lopez v. Merced County, California*, in which the court granted summary judgment for lack of organizational standing against the Mexican American Political Association's § 5 claims because the Association failed to proffer evidence "that [it] ha[d] suffered organizational harm, including any evidence that [it] actually diverted significant organizational resources in an effort to assure Hispanic

voter rights." 1:06-CV-1526OWWDLB, 2008 WL 170696, at *8 (E.D. Cal. Jan. 16, 2008). But *Lopez* was a summary judgment decision where the Association's claim to organizational standing foundered not because it was invalid as a matter of law but because the Association failed to meet its evidentiary burden. And as noted, other courts have unanimously recognized this application of organizational standing in the § 2 context.

Plan H358, like Plan H283, eliminates the district of former MALC member Raul Torres. At trial, MALC presented the testimony of Representative Rafael Anchia, the present chairman of MALC. Anchia testified that MALC has "dual purposes." Tr117. One purpose is to represent Latinos in Texas, and one is to grow MALC's membership. *Id.* Defendants presented no contrary evidence on MALC's purposes. On the basis of this evidence, MALC has organizational standing to challenge Plan H358's configuration of Nueces County, which perpetuates the elimination of HD33. MALC's injury due to this configuration is hardly speculative—MALC's loss of a member was caused directly by the elimination of Torres's district.

This is not a case where the Court must assess the expenditure of resources to counteract a certain enactment's effect to determine whether there is a sufficient injury; nor is this a case where MALC's nonmonetary efforts in counteracting the Plan are at issue. Instead, the injury here is as direct as can be—MALC's very existence, its raison d'être, depends on its membership and growing that membership, and Plan H358's treatment of Nueces County reduced that membership by eliminating Torres's district and deliberately placing Torres in a district he could not win.

See Lee, 155 F. Supp. 3d at 578. As a result, MALC has organizational standing to challenge Plan H358 in Nueces County.

associational/representational standing

The Court also finds alternatively that MALC has representational standing for its Nueces County claims. As mentioned, "[a]n association has standing to bring suit on behalf of its members when [1] its members would have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181. MALC easily satisfies the second and third prongs because the district lines are important to MALC's purposes of growing its membership and representing Latinos in Texas, and this litigation, like other similar redistricting cases, has proceeded without the participation of individual members. Accordingly, the only issue for associational standing is whether MALC has a member who would have standing to sue in his or her own right.

The only current MALC member in Nueces County is Abel Herrero, the representative for HD34 in Plan H358. MALC-1 at 3. Herrero is also a voter in HD34. As discussed above, Nueces County in Plan H358 includes two districts, HD32 and HD34. HD34, Herrero's district, is a Latino opportunity district. Thus, Herrero's standing (and therefore MALC's representational standing through Herrero) must exist even though Herrero lives in a Latino opportunity district in Plan H358.

"No circuit has developed a framework specifically for a Section 2 standing inquiry." *Pope v. Cty. of Albany*, No.

1:11-CV-0736 LEK/CFH, 2014 WL 316703, at *5 n.13 (N.D.N.Y. Jan. 28, 2014). As a result, this Court will look to the alleged injury and determine whether it is sufficiently concrete, causally connected to the Defendants' conduct, and redressable. *Lujan*, 504 U.S. at 560-61. *Pope*, in which a district court found that minority plaintiffs residing in existing majority-minority districts had standing to bring vote dilution claims based on the possibility of drawing an additional majority-minority district, is the most analogous authority in conducting this analysis. 2014 WL 316703. at **5-6.

"Nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This concept of proportional representation, which refers to "the success of minority candidates, as distinct from the political or electoral power of minority voters" is expressly *not* the right guaranteed by § 2. *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Therefore, lack of proportional representation alone cannot be the alleged injury in a § 2 vote dilution plaintiff's claim to standing. *See Pope*, 2014 WL 316703 at *5.

The Court in *Pope* contrasted "proportional representation" as that term was used by the Court in *De Grandy* with "substantial proportionality of political opportunity," which it defined as "per capita voting power on par with the majority." *Id.* A denial of this proportional opportunity under the existing voting system, said the court in *Pope*, was the "putative injury" suffered by a minority bringing a § 2 claim. *Id.* The *Pope* court concluded that "supported allegations that Plaintiffs reside in a reasonably compact area that could support additional MMDs [majority-minority districts]

sufficiently proves standing for a Section 2 claim for vote dilution" because the personalized injury is "that the apportionment of 4 MMDs to the sufficiently numerous and geographically compact minority population, as opposed to the 5 MMDs that Plaintiffs contend are required by the VRA, dilutes Plaintiffs' individual voting power—including those in existing MMDs." *Id.*

Supporting this conclusion is other Supreme Court language, not cited by the *Pope* court, indicating that the injury suffered by a § 2 plaintiff asserting a claim that additional minority opportunity districts are required goes beyond the boundaries of a single district and includes a geographic area. In *Shaw v. Hunt*, the Court stated that "[i]f a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b)." 517 U.S. 899, 917 (1996). In *De Grandy*, the Court recited "how manipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." 512 U.S. at 1007 (citing *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993)).

Thus, while the Court has said that § 2 rights are individual rights and not the right of the minority group as a whole, a claim that an additional minority opportunity district is required concerns individuals in a particular geographic area. As described in *De Grandy*, the basis of such a § 2 results claim in the single-member district

context is typically cracking or packing (or a combination of them). The claim will generally thus involve two or more districts within the geographic area where minority population is cracked or one or more districts in which the minority population is packed (and from which additional districts could be drawn), or some combination.[22] A voter such as MALC member Abel Herrero, who lives in HD34, essentially lives in an allegedly packed district because MALC's claim is that the Latino population in the area is sufficient for two Latino opportunity districts, but the plan contains only one. *See, e.g., Barnett v. City of Chicago*, No. 92 C 1683, 1996 WL 34432, at *5 (N.D. Ill. Jan. 29, 1996) (finding standing where "[p]laintiffs allege that many of their class members live in packed wards which could be redrawn into non-excessive majority African American wards"). Thus, the claim focuses on Herrero's district in the context of the broader geographic area.

For these reasons, this Court agrees with the conclusion of *Pope* and holds that plaintiffs who reside in a reasonably compact area that could support an additional minority opportunity district have standing to pursue § 2 claims, even if they currently reside in an opportunity district. Herrero would have standing to

---

[22] In *LULAC v. Perry*, 548 U.S. 399, 437, 504 (2006), Justice Kennedy stated that the question was "whether line-drawing dilutes the voting strength of the Latinos in District 23," disagreeing with Chief Justice Roberts' framing of the § 2 inquiry as "whether line-drawing in the challenged area as a whole dilutes minority voting strength." But the focus of this disagreement was not whether additional minority opportunity districts could be drawn in West Texas, but whether CD23 had been impermissibly diluted.

bring these claims in his own right, and thus MALC has representational standing to assert these claims.

In sum, MALC has standing to bring its challenges to Plan H358's configuration of Nueces County on two theories. First, MALC has organizational standing based on the loss of Raul Torres's seat in HD33 and its resulting loss of a member. Second, MALC has associational standing to represent the interests of its members because MALC member Abel Herrero would have standing to sue in his own right.

Analysis of the Merits

Having determined that MALC has standing to assert its claims, the Court considers its § 2 results claim. MALC offers two demonstration plans: Plan H400 and Plan H391. In Plan H400, Korbel drew two majority-HCVAP districts (55.2% HCVAP HD32 and 59.9% HCVAP HD34 using 2011-2015 ACS data) wholly within Nueces County, but found their performance on his exogenous election index to be so low as to indicate a lack of real electoral opportunity in both districts. Tr28; MALC-13 at 2. HD32 performed in 7/35 statewide elections (both state and federal), and HD34 performed in 0/35 statewide elections between 2010 and 2016. Tr28; MALC-13.

Despite its lower SSVR (ranging from 47.2% in 2010 to 47.7% in 2016), HD32 performed for Democrats (presumed to be the minority preferred candidate) in 4/5 elections in presidential election year 2012 and 3/8 in presidential election year 2016, but not at all in the non-presidential years, when Latino voter turnout is typically lower. MALC-13. And despite its higher (and increasing) SSVR (ranging from 50% in 2010 to 51.9% in 2016), HD34 did not perform at all in any year. *Id.*

Therefore, in Plan H391, Korbel "open[ed] up the county line" to draw two districts that would perform sufficiently to create "effective" Latino opportunity districts. Tr28; MALC-17 (Korbel Report) ¶ 80. The simplest way to accomplish this would be by adding Hispanic population from another county to a Nueces County district or placing Nueces County Anglo population in a district based outside Nueces County, either of which would break the Nueces County line only once. But Korbel testified that he could not create two effective districts by breaking the county line only once, and thus he maintained HD34 in a configuration very similar to that in Plan H358, removed Anglo Nueces County population and joined it with HD30 in Aransas, Calhoun, and Victoria Counties, and then joined the remainder of Nueces County in HD32 with all of Kleberg County.[23] Tr29; MALC-17 ¶¶ 80-82. This resulted in two districts with higher HCVAP than in Plan H400: HD32 in this plan is 61.2% HCVAP and HD34 is 66.4%. We are not informed of the specific performance of HD34, but since it maintains its general location and high HCVAP (66.4%) and SSVR (59.2%), presumably it would perform effectively. Proposed new HD32 performs 0/10 in 2010, 4/5 in 2012, 2/12 in 2014, and 6/8 in 2016 on Korbel's index. MALC-24.

---

[23] MALC's demonstration Plan H295 also breaks the Nueces County line two times–first by joining part of San Patricio County with HD34, and second by removing part of Nueces County population and joining it with HD32 in Aransas County. And demonstration Plan H205 took a similar approach, yet broke the county line a third time by joining some Nueces County population with HD43 to the south.

To establish its claim, MALC must first establish the three *Gingles* preconditions: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If MALC satisfies these three preliminary requirements, it must then satisfy the ultimate § 2 inquiry by showing from the "totality of the circumstances" that Hispanics have less opportunity than do other members of the electorate to participate in the electoral process and elect candidates of their choice.

The first *Gingles* precondition includes the requirements of numerosity and geographical compactness. For the numerosity requirement, the Court agrees with the Second Circuit in *Pope v. Albany County*, that a plaintiff need only show a simple majority of the relevant minority group (here, HCVAP) at the first *Gingles* step. "[T]his initial majority-minority inquiry serves a useful gatekeeping role by identifying, in broad terms, when a minority group has at least 'the *potential* to elect representatives in the absence of the challenged structure or practice.'" 687 F.3d 565, 575 (2d Cir. 2012) (quoting *Gingles*, 478 U.S. at 50 n.17). The court there noted that

> [t]he relative size of a minority group's majority in a district may well be among the totality of circumstances that can inform the ultimate determination of vote dilution and the appropriate remedy. But it is simply the fact, not the size, of a minority group's majority presence in a proposed

> district that permits a plaintiff to satisfy the first of *Gingles*'s preliminary requirements.

Id. at 574.[24] Thus, concerns about whether Hispanics have a "realistic" potential to elect representatives considering such things as voter registration rates and turnout "may well warrant careful consideration when a court reviews the totality of the circumstances in deciding the ultimate *Gingles* inquiry . . . [and] may also inform the appropriate remedy for a Section 2 violation." *Id.* at 575. Both of MALC's demonstration maps include two districts with greater than 50% HCVAP and thus satisfy the numerosity threshold.

In Plan H400, Nueces County is divided into two compact districts— HD32 and HD34. Although Corpus Christi is split, its population is too large to be placed entirely within one district, and it is likewise split in Plan H358. In Plan H391, HD34 tracks most of existing HD34, changing some boundaries only within Corpus Christi, and it includes Rep. Herrero's residence. Thus it can be said to respect the traditional redistricting principle of respecting existing district lines and member/constituent relationships. And the County Line Rule dictates that the remainder of Nueces County be joined with an entire

---

[24] The Second Circuit indicated that its position was in accord with the Fifth Circuit's decision in *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991). The Fifth Circuit did not expressly decide this issue, but did say that the "potential to elect" is all that is required under § 2 such that "[a]ll that must be shown is that 'the minority's voting age population exceeds 50%.'" *Id.* at 1117 n.9. However, the Court also referred to testimony that the minority-preferred candidate would have won, and noted that "it is entirely proper to refer to evidence other than census data to establish the 'potential to elect.'" *Id.* at 1117 & n.10.

county, and thus, under the strictures of the County Line Rule, HD32 reflects a compact community insofar as it connects the remaining Nueces County population to the whole of adjoining Kleberg County. But the fact that Plan H391 must also then excise Anglo population in two distinct areas in Nueces County (from both HD32 and HD34) joined only by water is troubling. If all that were required was to add adjoining similar Hispanic population from Kleberg County that would otherwise be separated solely by operation of the County Line Rule, the case for compactness would be much more compelling.[25] However, the Court will assume for sake of argument that Plan H391 also demonstrates compactness.[26]

The second and third *Gingles* requirements have already been established for Nueces County. This Court

---

[25] For example, if an identifiable compact community straddled the county line and thus would be divided solely by operation of the County Line Rule, keeping that community whole to provide voting opportunity where it would otherwise be lacking would present a strong case. However, MALC's demonstration maps indicate that creating two "effective" districts is not so simple. In MALC's demonstration Plan H205, Nueces County is placed into *five* districts. In MALC's Plan H295, HD32 takes part of Nueces County in two separate areas as well as part of San Patricio County, and HD34 spills out of Nueces County into the northern and eastern portions of San Patricio County.

[26] The Court notes that in MALC's demonstration Plan H201—its Whole County Plan that minimized county line breaks (it has three)—MALC left HD33 and HD34 wholly within Nueces County and then excised 6% of Nueces County's population (that was 76% Anglo) and joined it with HD32. However, rather than excising a whole area, it cherry picks several distinct areas along the Corpus Christi coast. But it demonstrates that, in the earlier phase, MALC proposed a plan with only one county line break related to Nueces County.

found legally significant racially polarized voting between Latinos and non-Latinos in Nueces County. Docket no. 1390 at 48. After examining the data and conclusions provided by several experts, the Court found that Latinos in Nueces County are highly cohesive, and that Anglos vote as a bloc usually to defeat minority preferred candidates.[27]

The updated expert analysis continues to show high levels of racially polarized voting in Nueces County. *E.g.*, MALC-22 Table 3. Plaintiffs have also provided expert testimony from Dr. Brischetto showing racially polarized voting in Kleberg County and the 52 South Texas counties, which includes Kleberg County. Brischetto 2014 Report Table 7; MALC-22 Table 4.

The Court thus turns to the totality of circumstances analysis. As noted, the County Line Rule would dictate that two districts be drawn wholly within Nueces County. When MALC's expert attempted to draw two HCVAP-majority districts, he felt that Latinos were essentially worse off than under Plan H358 because one district would not perform at all and one performed poorly (compared to Plan H358, where one district does perform

---

[27] The Court found extreme levels of racially polarized voting, and noted that, even if Defendants correctly argued that Plaintiffs must prove a non-partisan/racial basis for the polarization, Plaintiffs sufficiently did so by demonstrating racially polarized voting in the primaries. Dr. Engstrom analyzed both general elections and primaries and found legally significant racially polarized voting in both. Dr. Alford, Defendants' expert, endorsed Dr. Engstrom's methodology and report, and agreed that the levels of bloc voting (levels in the 90/10 range) found by Dr. Engstrom were legally significant. Docket no. 1390 at 50-51 n.50.

consistently for Latinos[28]) Thus, the logic goes, application of the County Line Rule, combined with other factors, is responsible for the vote dilution, and the County Line Rule must yield. But the Court finds that while MALC may have shown that Hispanics are entitled to two opportunity districts in Nueces County, it has failed to show that the County Line Rule must yield.

As this Court explained in its opinion on Plan H283, the VRA can require the State to violate the County Line Rule. Docket no. 1365 at 16-21. Traditional districting principles such as the County Line Rule may be subordinated to race to remedy a § 2 violation, so long as it is no more than reasonably necessary to comply with § 2. *Id.*

MALC contends that the two districts wholly within Nueces County shown in Plan H400 do not provide electoral opportunity because they do not perform sufficiently on Korbel's exogenous election index, and thus the County Line Rule must yield to allow creation of districts with better performance. This Court has already concluded that the results of an exogenous election index alone will not determine opportunity. Such indices often do not mirror endogenous election performance, though in demonstration districts we do not have the benefit of actual elections in the district to study. Rather than just relying on an exogenous election index to measure opportunity, the Court must conduct an intensely local appraisal to determine whether real electoral opportunity exists.

---

[28] HD34 performance in Plan H358 is 5/10 in 2010, 5/5 in 2012, 10/12 in 2014, and 8/8 in 2016 28 under Korbel's index. MALC-13; Tr26-28. HD32 does not perform at all.

The totality of the circumstances inquiry directs us to consider the Senate factors. "Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426. Although statewide Hispanics lack proportionality, in Nueces County they are around 56% of the relevant population (CVAP) and they have one of two (50%) of districts. Creating a second district would result in over-representation in Nueces County, but Hispanics statewide would still be under-represented.

Turning to the Senate factors, the Court need not again review the history of voting-related discrimination. Texas has a long history of such discrimination, and the Court found intentional vote dilution in the Legislature's enactment of the 2011 plan.

Another key Senate factor is the extent of racially polarized voting in the political subdivision. As discussed above, not only does racially polarized voting exist in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates. Dr. Engstrom found that, in the general elections, Latino support for the Latino Democratic candidate consistently exceeded 90%, while non-Latino support ranged between 7.5% and 17.6%. Docket no. 307-1 Table 2. This is similar to polarization levels that the Supreme Court characterized as "especially severe" in *LULAC v. Perry*, 548 U.S. 399, 427 (2006) (noting that 92% of Latinos voted against Bonilla while 88% of non-Latinos voted for him).

In the 2010 general election in HD33, in which incumbent Solomon Ortiz, Jr. was defeated, Latinos

supported Ortiz with 92.3% support, while non-Latinos gave only 11% support. Ortiz lost the election, receiving 47.49% (11,306 votes) of the vote to Torres's 52.51% (12,499 votes), a margin of only 1,200 votes. Latinos were only 45.08% of the turned out vote. Docket no. 1364 ¶ 234.

There was also extreme polarization in the 2012 HD34 general election, where Latinos supported Herrero with 95.55%, while non-Latinos gave only 11.09% support. MALC-161 Table 4. Non-Latinos voted cohesively in favor of Anglo incumbent Connie Scott with 88.91% of the vote, and Latino support was 4.45%. *Id.* Despite this extreme polarization, Herrero won the election with 57.17% (25,482) of the vote to Scott's 42.83% (19,088 votes). Countywide, Dr. Brischetto found that less than half (44.1%) of voters in the 2012 general election were Latino. MALC-161 ¶ 46 & Table 3 (approximately 42,000 voters were Latino and 53,000 were non-Latino). The Spanish Surname turnout (SSTO) was 55.1%. D-109 at 57. Hispanics were 68.2% of the CVAP in HD34 using 2011-2015 ACS data.

Another Senate factor is the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. There was evidence in the prior phase showing that Hispanics, including in Nueces County, suffer a "continuing pattern of disadvantage" relative to non-Hispanics.[29] They suffer disparities in health, income/

---

[29] Docket no. 1364 ¶ 286. Korbel examined updated data and found that the information had not materially changed, and "[t]he large financial, educational, employment and social gap remains." MALC-

employment, and education, and these disparities are strongly associated with lower rates of registration, voting, and participation in the political system. *See* docket no. 1390 at 27; docket no. 1364 ¶ 286.

Thus, statewide, Hispanics generally have substantially lower voter turnout than do Anglos, often attributed to the lingering effects of past discrimination. *E.g.*, Joint Expert Ex. E-3 (Lichtman Report) ¶ 11.[30] But there are significant turnout differences across counties. Countywide, Dr. Brischetto found that less than half (44.1%) of voters in the 2012 general election were Latino. MALC-161 ¶ 46 & Table 3 (approximately 42,000 voters were Latino and 53,000 were non-Latino). And Dr. Engstrom's analysis of the 2010 HD33 general election in which Ortiz lost showed that Latinos were 45.08% of the turned-out vote. Docket no. 307-1 at 26. Thus, it appears that Latinos are turning out to vote in Nueces County at lower rates than non-Hispanics.[31]

Defendants contend that Latinos have been elected to public office in the jurisdiction in high numbers, demonstrating equal opportunity. The evidence shows that there have been a significant number of Latinos in

---

17 at 2. Expert testimony also tied those lingering effects to past discrimination.

[30] Dr. Lichtman found the percentage of Hispanic VAP participating in elections was 14% statewide, and that it ranged from 4% to 19% of the VAP in the counties he studied. But he did not look at Nueces County. And he notes that this percentage is from the VAP, not the CVAP, and thus reflects the much lower citizenship rates for Latinos in certain areas.

[31] In 2011, the SSVR in Nueces County was just below 50%. The Court is not aware of any evidence showing the countywide SSVR% in 2013 or more recently.

elected office in Nueces County, including the county attorney, district clerk, three of eight district court judges, and three of eight Corpus Christi council members. Docket no. 1364 ¶ 285. And Latinos, such as Abel Herrero and Raul Torres, have been elected to house districts.

"The Report notes also that evidence demonstrating . . . that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *LULAC*, 548 U.S. at 426 (quoting *Gingles*, 478 U.S. at 44-45). MALC contends that the Legislature has a newfound appreciation for the County Line Rule and is using it pretextually to avoid creating Latino opportunity districts. The Court finds that the County Line Rule is a legitimate and important traditional districting principle in Texas. *See Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981). Even though MALC presented evidence through its expert Korbel that the Legislature has not always adhered so strictly to the County Line Rule in the past, a violation of the County Line Rule could result in litigation on that basis. Though the Legislature used the County Line Rule for its political advantage in 2011 and 2013, the Court finds that it nevertheless must be respected unless § 2 requires otherwise.

Based on an analysis of the *Gingles* requirements and the totality of the circumstances, the Court finds that MALC has demonstrated that an additional compact minority district could be drawn in Nueces County—Plan H358 has one, when two could be drawn. Although Hispanic voters in Nueces County have a § 2 right to an additional district, the main question presented is whether it entitles them to a configuration such as that in

Plan H400 (two HCVAP-majority districts that are poorly performing or not yet performing) or a configuration such as that in Plan H391, where the County Line Rule is broken to create two "effective" districts.[32] To find that Plan H391 is appropriate, the Court must conclude that subordinating the County Line Rule is necessary to comply with § 2. But the Court concludes that Plaintiffs have not adequately demonstrated that they lack equal opportunity in a configuration such as that in Plan H400 such that a county line break is necessary.

Certainly the high levels of racially polarized voting and the lingering effects of past discrimination affecting voter turnout weigh in MALC's favor. This Court previously discussed how Plaintiffs could assert that HCVAP-majority districts do not present real electoral opportunity due to racially polarized voting and lower registration and turnout caused by the lingering effects of official discrimination. But there is simply not enough evidence to conclude that the districts in Plan H400 do not provide real electoral opportunity.

Nueces County was estimated to be about 56% HCVAP in 2010. Docket no. 1364 ¶ 237. Its growth between 2000 and 2010 was Hispanic growth, as both African-American and Anglo population declined, and its HCVAP continues to climb. *Id.* Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election. Although Dr. Brischetto found that, given the high levels of racially polarized voting, minorities generally win in districts only if the combined minority

---

[32] A third option is to maintain the current configuration (one safe district and one not).

VAP exceeded 66%, his analysis also showed Abel Herrero won HD34 with HCVAP levels of 59.4% in 2004 and 2008. MALC-165; MALC-166 Table 1. In Plan H400, proposed HD34 has an HCVAP of 59.9%. Although the HCVAP in proposed HD32 is lower at 55.2%, that district provides opportunity, at least in presidential election years, under Korbel's index.[33]

Further, whether Hispanics win elections is not the same thing as whether they have the *opportunity to win* elections. *LULAC*, 548 U.S. at 428 ("The circumstance that a group does not win elections does not resolve the issue of vote dilution."). In 2008, HD33 (60.4% HCVAP) and HD34 (58.2% HCVAP) were performing Latino opportunity districts with total SSVR of 54.3% and 53.6%, respectively.[34] D-100. In 2010, they were still Latino opportunity districts, but the Latino-preferred candidate lost (though by only 1,193 votes and 2,037 votes). Korbel's analysis was the only election analysis of the proposed districts in Plan H400. Most of the elections in his index did not involve a *Latino* Democrat candidate, who would presumably be the Latino-preferred candidate. Such elections would be more probative because Latinos would have a "horse in the race."

---

[33] In *Salas v. Southwest Texas Jr. College District*, 964 F.2d 1542, 1556 (5th Cir. 1992), the Fifth Circuit held that the fact that Hispanics were 53% of registered voters was "persuasive evidence that Hispanic voters are not deterred from participation in the political process because of the effects of prior discrimination, including unemployment, illiteracy, and low income."

[34] In 2012, Herrero easily defeated Scott in the reconfigured "safe" Latino opportunity district HD34, and has not had a challenger since.

In addition, Korbel only looked at statewide races and no county races. Districts may perform quite differently in local elections than they do in state and federal elections. Thus, we know that Democrats in statewide elections and federal elections (President and U.S. Senate) would generally lose in these proposed districts, but we do not know how they might perform in local elections with Latino candidates. It is conceivable that, in competitive local races with Latino candidates, Hispanic voters would mobilize in significantly higher numbers.

Moreover, in Plan H400, both HD32 and HD34 include demographic distributions strongly favoring Hispanic voters. In HD32, with 55.2% HCVAP, there are approximately 68,700 Hispanic citizens of voting age and only 55,800 non-Hispanics.[35] Thus, there are approximately 13,000 more Hispanic citizens of voting age than all other groups combined. In HD34, with 59.9% HCVAP, there are approximately 73,500 Hispanic citizens of voting age, compared to 49,000 non-Hispanics.[36] Thus, there are approximately 24,500 more Hispanic citizens of voting age than all other groups combined. These numbers translate into a significant advantage in house district elections, given that in none of the elections analyzed by Korbel did more than approximately 50,000 total voters even participate in either HD32 or HD34, and

---

[35] 2011-2015 ACS data show approximately 124,510 citizens of voting age in HD32, 55.2% of whom (68,729) are Hispanic. MALC-13 (Red-116 Report) at 5. Thus, the Court counts the remainder (~55,800) as non-Hispanic.

[36] 2011-2015 ACS data show approximately 122,645 citizens of voting age in HD34, 59.9% of whom (73,464) are Hispanic. MALC-13 (Red-116 Report) at 5. Thus, the Court counts the remainder (~49,200) as non-Hispanic.

in non-presidential election years the number was closer to 30,000 voters.[37] In other words, if these Hispanic citizen voting age persons registered and turned out (and voted cohesively), they could easily control elections.

As noted, Korbel found that HD32 performed 0/10 in 2010, 4/5 in 2012, 0/12 in 2014, and 3/8 in 2016, with the unsurprising trend that performance for Latinos increased significantly in presidential election years. Although Korbel did not include 2008 in his chart, he did include the underlying election data, and using his criteria, the Latino-preferred candidate (Democrat) received more votes than the Republican candidate in 8 of 8 elections. MALC-13 at 10. Similarly, although Democrats won no elections in HD34 in 2010 through 2016 in Korbel's index, they received more votes than Republican candidates in 4 of 8 elections in 2008 (and lost two by margins of .2 and .4%). *Id.* This also indicates that the districts provide potential to elect.

Although it cannot be denied that Hispanics suffer the effects of lingering discrimination and that this affects their voting and turnout, the Court finds that Hispanics

---

[37] In presidential election years, voter turnout levels were around 50%. In 2008, the HD32 turnout was 50,567 voters and the HD34 turnout was 53,493 voters. MALC-13 at 7. In 2012, the HD32 turnout was 46,044 voters and the HD34 turnout was 51,757 voters. *Id.* at 17. In 2016, HD32 had 47,927 voters and HD34 had 56,626 voters. *Id.* at 21.

In non-presidential years, total voter turnout was around 30%. In 2010, there were 29,044 voters in HD32 and 32,965 voters in HD34. MALC-13 at 11. In 2014, HD32 had 27,250 voters and HD34 had 30,825 voters. *Id.* at 22. Given these numbers of total voters, the fact that Hispanics have 13,000 more citizen voting age persons in HD32 and 24,500 more in HD34 than all non-Hispanics combined is significant.

have equal opportunity in two districts drawn wholly within Nueces County (or at least MALC has failed to show that they do not).[38] These districts may not be the best configuration for minority success, but the "ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success." *LULAC*, 548 U.S. at 428. Based on the evidence before the Court, breaking the County Line Rule twice to remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires.

In sum, Nueces County had two minority opportunity districts, but they could not be maintained in their benchmark configurations due to population loss. Rather than exploring whether two HCVAP-majority districts wholly within Nueces County should be drawn, the Legislature drew one safe district for Hispanics and one safe district for incumbent Republican Todd Hunter. The evidence shows that two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, and that § 2 could require those two districts. But the evidence does not show that the Legislature was required to break the County Line Rule to draw what Plaintiffs consider to be "effective" districts.

---

[38] In *Gingles*, the Supreme Court noted that, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17 (emphasis in original). Similarly, if they possess the potential to elect (real electoral opportunity) even with application of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. That Latino voters might be more successful under districts drawn without the strictures of the County Line Rule is not the relevant focus under § 2.

Thus, the Court must consider whether § 2 requires a remedy for this results violation. In addition, the Court previously found that the Legislature intentionally discriminated and violated one person, one vote principles in configuring the HD32/HD34 border in Plan H358, and that discrimination was purposefully maintained in Plan H358. That intentional discrimination requires a remedy.

This does not necessarily mean that two districts must be drawn in Nueces County as proposed in Plan H400. In *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), the Supreme Court discussed the choice between "creating 'safe' districts . . . or a greater number of districts in which it is likely, although perhaps not quite as likely . . . , that minority voters will be able to elect their candidates." It noted,

> Either option will present the minority group with its own array of electoral risks and benefits, and presents hard choices about what would truly maximize electoral success. On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, such a plan risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts. And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the

> representation may be limited to fewer areas. On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose.

Id. at 480-81 (internal quotations and citations omitted). Thus, Plaintiffs should consider their preferred configuration for the remedy stage. But, as noted, the intentional discrimination previously found (and the one person, one vote violation) requires a remedy.

F. Midland/Ector Counties

MALC has consistently contended that a new Latino opportunity district was required in Midland and Ector Counties. No new Latino opportunity districts were considered or drawn in Midland/Odessa because the proposed HCVAP-majority districts all broke the County Line Rule. During the prior phase of litigation, MALC offered four plans that proposed a new Latino opportunity district in the Midland/Ector County area—Plans H205, H295, H329, and H360. In its Opinion on Plan H283, the Court found that Plaintiffs failed to prove the first *Gingles* precondition for the proposed districts in Plan H205 and H295 because they failed to demonstrate a compact minority population. The Court found that Plan H329 and Plan H360 were best considered in the 2013 plan trial phase because these plans were first introduced during

the 2013 legislative session. In the 2013 session, the Legislature continued its steadfast refusal to consider any districts that would cause a County Line Rule violation, and no new Latino opportunity districts were drawn in the Midland/Odessa area. *See, e.g.*, JX-15.3 at 126.

MALC continues to pursue its § 2 results claims. It notes that Hispanic growth requires a Latino opportunity district in Midland and Ector Counties despite the fact that its creation would violate the County Line Rule. MALC relies on Plan H329 and Plan H360, and now additionally offers Plan H321, a plan proposed by Rep. Martinez Fischer during the 2013 session. Tr175 (Martinez-Fischer); MALC-28 (plan map and data). MALC contends that HD81, which was 51.7% HCVAP using the ACS data available to the Legislature at the time, combines a "vibrant community of interest of cohesive Latino neighborhoods in Midland and Odessa" with seven other whole counties and dividing no other county line except Midland and Ector Counties. Docket no. 1525 at 16-17.

Plan H329 proposed HD81 with 55.3% HCVAP and 53.7% SSVR. MALC-14 at S47; MALC-96. In Plan H329, proposed HD81 takes in part of Midland and Ector Counties and large portions of West Texas, while HD82 takes in the remainder of Midland and Ector Counties. MALC also offers Plan H360 as a plug-in plan. MALC-91 (map). HD81 in this plan includes Ward, Crane, Upton, and minority parts of Ector and Midland Counties. Proposed HD81 is 50.1% HCVAP using 2008-2012 ACS data. MALC-93. HD82 takes the remainder of Ector County and Midland County and pairs them with Dawn, Martin, Andrews, and Winkler Counties. Korbel testified that the minority populations of Midland and Odessa are

only about 12 to 15 miles apart. TrJ1396. Plan H360 has no VTD splits. TrJ1398 (Korbel).

MALC's proposed districts satisfy the numerosity requirement and MALC offers strong evidence that the minority population is compact (especially as demonstrated by Plan H360 and the testimony of Luis Sanchez). *See LULAC*, 548 U.S. at 435 (members of a racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity"). MALC also offered testimony showing racially polarized voting between Latinos and non-Latinos in Midland and Ector Counties. TrJ947, TrJ969; MALC-161 (2014) (Brischetto).

But the Court cannot reach the merits of this claim (or any intentional vote dilution claim based on the failure to draw this district) because MALC lacks standing, and it is the only Plaintiff that has pled this claim. Although the Perez Plaintiffs have joined MALC (and LULAC has joined the Perez Plaintiffs for certain House claims) in this phase for litigation purposes, only MALC has pled a claim for vote dilution in Midland/Ector Counties, such that MALC cannot rely on the Perez Plaintiffs or LULAC for standing.[39]

MALC's arguments for standing to bring its claims in Midland/Ector Counties are essentially the same as its arguments for standing in Nueces County. Docket no. 1462 at 12. In particular, MALC argues that it has

---

[39] The NAACP notes that it has members in Midland County, but the NAACP also did not plead a claim for a § 2 Latino opportunity district in Midland, so MALC cannot rely on the NAACP members' standing. Perhaps recognizing this, MALC seeks to rely on NAACP member standing only in Fort Bend, Harris, Dallas, Nueces, and Bell Counties. Docket no. 1462 at 5 n.1.

organizational standing to seek a remedy for an injury to itself as an organization and that it has representative/associational standing to sue on behalf of its members. As discussed above, MALC prevailed on both of these arguments with respect to Nueces County. But applying the same principles from that discussion, MALC's arguments fail in Midland/Ector Counties.

MALC does not fully describe how its claim to organizational standing would apply in Midland/Ector Counties. But the claim to standing here on this basis is far weaker than in Nueces County, where the changes to the House Plan directly caused MALC's membership to decrease because of the loss of Raul Torres's seat. In order to claim that Plan H358's configuration of Midland and Ector Counties injures it, MALC must argue that the configuration prevents MALC membership from growing. This basis for standing is too speculative, as it relies on the *possibility* that if such a district were drawn, it would elect someone who would then join MALC. Further, accepting this argument would mean that MALC would have similar standing in any county in which it argued that a district should be drawn that might elect a Latino. Unlike in Nueces County, where the record clearly demonstrates that the removal of HD33 decreased MALC's membership by ousting Torres, there has been no similar effect here. This theory does not support standing.

MALC's claim to representational standing in Midland/Ector Counties likewise fails. MALC argues that its "membership in the West Texas area includes a Latino member," without further elaboration. Docket no. 1462 at 12. Reviewing MALC's membership list, MALC has numerous members in the "West Texas area,"

particularly in the El Paso area. MALC-1. But the "West Texas area" is vast, and MALC has no members who represent districts containing any part of Midland or Ector County. The only MALC member who might be affected by MALC's proposed changes to these districts is HD74 representative Poncho Nevarez. In Plan H321, HDs 81 and 82 (containing Midland and Ector Counties) are reconfigured to slightly affect the northeast corner of Nevarez's HD74. In Plan H329, HD74 grows in the northeast to extend through Ward, Crane, and Upton Counties and encompass southern portions of Midland and Ector Counties. That Nevarez's district might be affected by the drawing of a new opportunity district is not alone sufficient to give MALC standing at the liability phase.

MALC has not put on evidence of where Nevarez resides within HD74, which would allow the Court to determine whether Nevarez himself lives in an area that is directly affected by either change. In any event, Nevarez resides in a Hispanic opportunity district in HD74. Thus, Nevarez's individual standing must be similar to that of Abel Herrero in Nueces County, who lives in an opportunity district yet has standing because of the packing in his district. But the essence of MALC's claim is that the Hispanic population in Midland/Ector Counties is cracked, not packed, and Nevarez does not live in the cracked area. And there is no allegation that Nevarez's district is packed and that unpacking it would create additional Latino opportunity. MALC's own

demonstration plans would increase the HVAP of HD74.[40] Stated differently, no MALC member suffers an injury in HD74 under Plan H358 because the evidence shows that the district is more "packed" under Plans H321 and H329 than it is in Plan H358.

HD74 is the only district home to a MALC member that could possibly be affected by the alleged vote dilution through cracking in Midland/Ector Counties. But the representative and resident of that district suffers no apparent harm from that vote dilution. For these reasons, MALC does not have standing to pursue its claims in Midland/Ector Counties, and these claims are dismissed.

G. Bexar County

This Court altered HD117 in Plan H309, and that new configuration remains in Plan H358. In its Opinion on Plan H283, the Court found that any § 2 effects claims in Bexar County were remedied and were thus moot, but it also found that Plaintiffs proved their intentional vote dilution and discrimination claims under § 2 and the Fourteenth Amendment regarding HD117. Plaintiffs succeeded on their "nudge factor" claims with regard to HD117 insofar as mapdrawers intentionally and successfully minimized Hispanic voter registration and turnout to decrease Hispanic performance.[41]

---

[40] Under the challenged Plan H358, HD74 has a HVAP of 76.6%; under Plan H321, HVAP increases to 77.3%; under Plan H329, HVAP increases further to 78.5%.

[41] The Court also found that the Task Force Plaintiffs succeeded in their *Shaw*-type racial gerrymandering claim with regard to HD117.

MALC[42] asserts claims that Plan H358 did not fully remedy the intentional discrimination in HD117, and proposes changes shown in Plan H391. Docket no. 1462 at 12-13; Tr55-56 (Korbel). MALC's expert opined that the 2014 election returns show that HD 117 "does not perform sufficiently for Hispanic citizens to elect their candidate of choice" and "[g]iven the finding of discriminatory intent with respect to HD 117, a full remediation is appropriate." Tr804; MALC-17 (Korbel Report) ¶ 86. Korbel bases his conclusion that HD117 did not sufficiently perform for Latinos to elect their candidate of choice on endogenous election results in 2014 because the Latino candidate of choice did not prevail in 2014.[43] Tr804. He stated that the exogenous election results were "not particularly helpful." *Id.* MALC proposes the configuration in Plan H391, which "strengthens the electoral performance of HD 117." *Id.* ¶ 87.

This Court remedied the nudge factor claim in Plan H309 and returned HD117 to opportunity status. The fact that HD117 did not perform in 2014 does not show that it was not fully remedied—even before application of the "nudge factor," HD117 did not always perform for Latino-preferred candidates, as evidenced by Garza's win in 2010. There is no evidence from which to conclude that the

---

[42] MALC member Philip Cortez resides in HD117. MALC-1 at 3.

[43] Philip Cortez won two of three elections since this Court modified HD117 in Plan H309. Tr56-57. Dr. Brischetto's EI analysis of five statewide general elections found continued racially polarized voting in Bexar County in 2014 and 2016, with Latino voters cohesively supporting the Democratic candidate between 80.6 and 81.6% and Anglo voters supporting the Republican candidate at 76.1% and 82.8%. Tr85; MALC-22 Table 8.

intentional discrimination found by this Court continues in HD117 in Plan H358.

No further changes are required in Bexar County.

H. Tarrant County

In its Opinion on Plan H283, the Court rejected Plaintiffs' packing and cracking claims. However, the Court found that mapdrawers increased the SSVR of HD90 in bad faith (to claim offset for the loss of HD33) and to simultaneously shore up the Anglo population of HD93.

In 2011, during the "member-driven" redistricting process, the Tarrant County delegation submitted an agreed map, and Rep. Lon Burnam (HD90) and Rep. Marc Veasey (HD95) approved their districts. Later in the process, mapdrawers and redistricting leadership decided to increase the SSVR of HD90 above 50% in an attempt to offset the loss of Latino opportunity district HD33 in Nueces County for § 5 purposes. They increased the SSVR by manipulating population based solely on race, including by removing the predominantly African-American community known as Lake Como.[44]

---

[44] This Court's Order noted that, in increasing the SSVR of HD90, mapdrawers fixated solely on the 50% racial target and moved a significant number of individuals on the basis of race:

> There is undisputed evidence that mapdrawers manipulated the population based on race, removing some areas and swapping out population to increase the SSVR of HD90 from 40/41.9% in Plan H113 to 47.9/50.1%. There is little indication that they cared about traditional redistricting factors or maintaining communities of interest; they were only concerned with raising the SSVR to 50.1%. The district became the most underpopulated district in the plan. The African–American community of Como was removed from

MALDEF had advocated for the HCVAP in HD90 to be increased, and the Task Force Plaintiffs argue now that there was nothing wrong legally with raising the SSVR in HD90 in 2011.[45] Regardless of whether § 2 required that the SSVR in HD90 be raised in 2011 so that Latinos could control Democratic primaries, it is clear that the Legislature's motive for the change was to undermine Latino opportunity rather than enhance it. There is no indication that the Legislature undertook any analysis of whether HD90 was a performing district or whether it needed an increase in SSVR to become a performing district.[46] Rather, they increased its SSVR because it was already electing a Democrat, so raising the SSVR would not cost them politically, and they attempted to use the increase to offset the loss of HD33. The D.C. Court properly rejected this claim, noting that "all the

---

> HD90 and placed into a Republican district represented by Anglo Rep. Geren. Other population was swapped between HD90 and HD95, and between HD90 and HD93. Overall, substantial Anglo population was removed (approximately 12,000 total population and 11,000 VAP), while Black+Hispanic total population and B+HVAP was increased.

Docket no. 1365 at 70.

[45] In this phase of the litigation, the Task Force has argued that Lon Burnam was not the Latino candidate of choice. However, in 2011 the Task Force also advocated for the Legislature to increase the HCVAP/SSVR in HD148, where there appears to be no dispute that Jessica Farrar was the Latino candidate of choice.

[46] Burnam had been HD90's representative since 1996. Tr205 (Burnam). Between 1996 and 2012, Burnam did not draw a challenger in the Democratic Primary. Tr226-27 (Burnam). Rep. Veasey had stated on the House floor that HD90 was already a performing opportunity district, and there is no indication that the Legislature believed otherwise.

experts' election analyses show[ed] that" that it was already an ability district. *Texas v. United States*, 887 F. Supp. 2d 133, 176 (D.D.C. 2012). They also used the increase in HD90 to try to pre-empt any § 2 claims based on the failure to increase the number of Latino opportunity districts statewide. The changes to HD90 also allowed them to shore up the Anglo population of HD93. Docket no. 1365 at 71.

Reps. Burnam and Veasey opposed the changes during the 2011 session, particularly the removal of Como from HD90. Burnam stated on the floor that the district had essentially been the same since its creation in 1978, and he and Veasey both argued that Como should be in HD90. Burnam's proposed amendment to return Como to HD90 was tabled.[47]

The Tarrant County configuration from Plan H283 remained unchanged in Plan H309. However, changes were made during the 2013 session to HD90, HD97, and HD99 and incorporated into Plan H358. The main change returned the Como community to HD90. The Task Force Plaintiffs bring claims targeted at this change.

The NAACP Plaintiffs, MALC, and Perez/LULAC Plaintiffs bring claims for intentional discrimination in Tarrant County. No party advocates for the creation of an additional minority opportunity district under the § 2 results test, but they contend that the intentional discrimination/vote dilution found by this Court in Tarrant County requires a remedy that maintains or enhances minority opportunity. Their proposed remedies

---

[47] A complete description of what transpired is included in the Court's fact findings, docket no. 1364 ¶¶ 619-634.

are shown in Plan H391 (MALC)[48] and Plan H392 (NAACP).[49] Because those plans and arguments go to remedy rather than liability, the Court will consider them at the remedial phase. The Court thus turns to the Task Force's claim regarding changes made to HD90 in Plan H358.

I. HD90

The Texas Latino Redistricting Task Force challenges HD90 in plan H358 as both a racial gerrymander (a *Shaw*-type claim) and as dilutive of Latino voting strength in violation of § 2 and the Fourteenth Amendment. Docket no. 891 ¶¶ 41, 78-79; docket no. 1468.

After the 2011 session in which the SSVR of HD90 was increased in part by removing Como from the district, Como residents had written to and called Burnam expressing their desire to be returned to his district.

---

[48] MALC's Plan H391 redraws all of the districts in Tarrant County and "eliminates or reduces the splitting" of numerous cities within the County. MALC-17 (Korbel Report) ¶ 62. Korbel states that Plan H358 contains three performing minority opportunity districts (HD90, HD95, and HD101), and that while two are compact, HD90 arguably is not. *Id.* ¶ 66. According to Korbel, Plan H391 proposes four "minority opportunity districts" in Tarrant County—majority-BCVAP (50.8%) HD95, majority-HCVAP (51.1%) HD90, and B+HCVAP-majority coalition district HD101, and HD93, which would not be a coalition district because its H+BCVAP is below 50% (27% BCVAP and 15.9% HCVAP) but would provide electoral opportunity. *Id.* ¶¶ 67-71.

[49] The NAACP contends that HD101 is a minority coalition district protected by § 2 and that any remedy for found violations in Tarrant County should preserve this district. Docket no. 1529 at 61. In NAACP demonstration Plan H392, HD95 is converted from 49.3% BCVAP to 51.7% BCVAP. HD90 remains HCVAP-majority and HD101 remains H+BCVAP majority.

Tr231 (Burnam). Both Geren and Burnam knew that Como's residents wanted to be in Burnam's district. *Id.*; D-731 (letter sent from Como community leader Dorothy DeBose to Burnam, expressing a desire to be returned to Burnam's district; a copy was also sent to Geren. Tr631 (Kenney)). Burnam too wanted Como back in his district. Tr231 (Burnam).

In the 2012 Democratic Primary, a Latino candidate, Carlos Vasquez, challenged Burnam. Burnam attributed the removal of Como from his district as the reason he drew a challenger in 2012 for the first time in 16 years. Tr227. Burnam won the primary by 159 votes and went on to win the general election in November 2012. TF-58; Tr312 (Espino). Vasquez received 70.6% of the Hispanic vote. D-424 at 20. Burnam received 74.3% of the Anglo vote and 62.3% of the African American vote. *Id.*

In the 2013 special session, Burnam successfully returned Como to his district. Burnam instructed his chief of staff Conor Kenney to draw an amendment to return Como to HD90. According to Kenney, Burnam provided two initial instructions—keep the amendment simple by involving only two (or maybe three) members,[50] and bring Como back into HD90. Tr635 (Kenney). Working from these instructions, Kenney created an initial draft map—Plan H328—with an SSVR of 48.2%, a decrease from the 2011 Plan. Tr639 (Kenney); Tr210 (Burnam); D-799. Kenney sought an "informal kind of temperature check" on this draft from Representative Martinez-Fischer and Martin Golando of MALC, who expressed concerns over the low SSVR. Tr638 (Kenney).

---

[50] This was to comply with Chairman Darby's constraints on proposed amendments.

Kenney began re-working Plan H328 while keeping an eye on SSVR, which he discussed with Burnam. Tr640-41 (Kenney). Burnam instructed Kenney to "draw a version that does a little more swapping between 90 and 99 that restores the SSVR level back up to . . . the plan that we were amending." Tr641 (Kenney). Kenney started by swapping whole precincts between the districts, but quickly began trading populations at the block level, using racial shading and HVAP as a proxy for SSVR. Tr643-44 (Kenney). Kenney said he "spent hours trading things back and forth," and tracked SSVR as he went. Tr649 (Kenney). Kenney never considered election or political data outside of SSVR. Tr645 (Kenney). The finished product—Plan H342—had an SSVR of 50.1%, which was a decrease from the 2011 Plan but nevertheless met the 50% target. D-800 at 2. In Kenney's opinion, this configuration represents the highest possible SSVR when working under Burnam's other two instructions of returning Como and swapping only with HD99. Tr649-50 (Kenney).

In Burnam's words,

> The first [map] that we drew [H328] that got Como in there had too much of an impact on the Hispanic percentage of voters, and so we really made some ugly lines to—basically we got rid of every white voter near the western boundary of the district to keep the Hispanic vote over 50 percent, but to get Como back into the district [in H342].

Tr210. Burnam added that "there were too many white people" in H328's HD90. Tr212. According to Burnam, the purpose of moving white voters into HD99 was to create a 50+% SSVR district. Tr217.

Burnam's descriptions of the use of race to create a 50%+ SSVR district were not limited to generalities. *See* Tr215-16 (Burnam) ("[I]s it correct to say that from your first amendment in 2013 till your second amendment in 2013 you attempted to bring up the [SSVR] by removing white voters from the district?" . . . "Correct."). Burnam identified boundaries in the following neighborhoods and precincts that were split or relocated entirely in order to remove Anglo population from HD90: Samson Park, Montgomery Plaza Redevelopment, Precinct 4068, Precinct 4493, Precinct 1015, and Precinct 1674. Tr217-18, 222-26. In other cases, Hispanic areas were brought into HD90 to increase SSVR; Burnam identified portions of Precincts 4125, 1434, and 1408 as examples. Tr222, Tr225. Furthermore, Burnam testified that minimizing population deviation in the district was "lost in the process" because "we had to deal with taking as many white folks out as we could." Tr215.

The finished version (Plan H342 or "the Burnam amendment") modified only the western boundary of the district by mostly trading populations with HD99 in an effort to return Como to HD90 while also keeping HD90's SSVR above 50%. But the amendment also affected the boundaries of a third district—HD97, which borders HD90 to its south and west. Precinct 1472 in HD97 is an area of railroad tracks and contains no population. In order to make Como (in Precinct 1120 to the immediate north) contiguous with the rest of HD90, Burnam's amendment placed this portion of HD97 into HD90. Tr213 (Burnam). Representative Craig Goldman of HD97 agreed with this change. Tr213 (Burnam). In a second spot on HD90's western boundary, HD97 moves Precinct 1434 into HD90. Burnam provided the only evidence

regarding the reason for this change: "It's low income and Hispanic." Tr225 (Burnam).

On June 20, 2013, Rep. Burnam offered the final version—Amendment No. 8 (Plan H342)—on second reading. Rep. Burnam stated,

> The original amendment has the intent of returning the neighborhood [Como] to District 90 that has always been in District 90 since the federal court created it back in 1978. The amendment to the amendment corrects some numbers a little bit. It has an impact on Craig Goldman's district, but the precinct that is added into my district has no population; it's just a connector precinct. It has an impact on Chairman Geren's district, but basically what it does is take the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district. I believe it's acceptable to the author.

JX-17.3 at 29. Chairman Darby then stated, "Members, Representative Burnam has revised his amendment and it now keeps this district a Hispanic district—brings the numbers back over 50 percent. That was the objection. I believe Representative Geren is in favor of this amendment also, so with that I would move to accept this amendment." JX-17.3 at 29. It was adopted.

The first election under this new map, which included the Burnam Amendment, was the 2014 Democratic Primary, in which Ramon Romero, Jr. challenged Burnam. By all accounts, the race was a hostile one—the Task Force presented evidence of fliers, phone calls, and online posts that highlight this hostility. *E.g.*, Tr319-20 (Espino testifying about Latin Kings flier); Tr321 (Espino

testifying about Fake Democrats image). In Como's Precinct 1120, Burnam won 383 votes of 471 votes cast. TF-39 at 2; Tr317 (Espino). But Romero defeated Burnam by 110 total votes. D-920 at 3. According to Dr. Engstrom's multivariate analysis of the race, Romero received 78.2% of the Latino vote, 12.6% of the African-American vote, and 24.3% of the remaining votes. TF-19 at 31. After defeating Burnam in the 2014 primary, Romero went on to win the general election. Tr341-42 (Espino). Since then, Romero has not faced a challenger in the primary. Tr342-43 (Espino).

The Task Force Plaintiffs argue that Burnam returned Como to HD90 to protect himself against a Latino challenger in the Democratic primary, and thus to intentionally dilute Latino voting strength. They assert that the heavily African-American community of Como was not likely to support a Latino challenger, that Burnam knew this, and that Burnam wanted Como back at least in part for that reason. They further assert a *Shaw*-type racial gerrymandering claim because, regardless of intent, the changes to HD90 were predominantly based on race without a compelling state interest. The Court finds that the Task Force has standing to assert both claims because at least one member of HOPE is a registered Latino voter in HD90. Docket no. 1314-1 at 3; TF-21.[51]

---

[51] In its previous opinion on the 2011 Congressional Plan, this Court held that "the Task Force has associational standing based on the standing of the individual members of its constituent organizations such as HOPE and NOMAR." Docket no. 1390 at 94 n.82 (collecting cases).

The Court first considers the Task Force's *Shaw*-type claim. The Court does not find that returning Como to HD90 was a race-based decision—Burnam did not wish to return Como to HD90 because its residents were African-American but rather because they were a high turnout area that had been in his district since its creation, had supported him, and wanted to be returned. But the changes to HD90 between Plan H328 and Plan H342 to ensure that its SSVR was above 50% were dictated solely by race. Burnam and Kenney methodically scanned the western border of the district, cutting out majority-Anglo areas precisely because they were Anglo and drawing in majority-Hispanic areas precisely because they were Hispanic. These changes are described in detail above, with both Burnam and Kenney explicitly acknowledging the use of race in their method and Burnam speaking candidly about there being "too many white people" in HD90.

Neither Burnam nor Kenney examined election results while making these changes. Tr671 (Kenney). Furthermore, neither Burnam nor Kenney identified other traditional redistricting criteria that would have justified these changes, and such criteria were subordinated to the goal of increasing SSVR. The amendment contains numerous precinct splits that further this goal and no others. *See* TF-3I (Red375 Report for Plan H358 showing 10 split precincts in HD90). In short, the testimony of both Burnam and Kenney is strong direct evidence that race was the predominate factor motivating the decision of which individuals to place within and without HD90.

The Court next considers whether the changes involved a "significant" number of voters and whether

race predominated as to the district as a whole. *See Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (plaintiff must demonstrate that race was the predominant factor motiving the legislature's decision to place "a significant number of voters within or without a particular district"); *Bethune-Hill v. Virginia State Bd. Of Elections*, 137 S. Ct. 788, 800 (2017) (the ultimate inquiry is the legislature's predominant motive for the design of the district as a whole). In *Bethune-Hill*, the Court noted that

> [t]he ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole. A court faced with a racial gerrymandering claim therefore must consider all of the lines of the district at issue; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context. Concentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target. A holistic analysis is necessary to give that kind of evidence its proper weight.

137 S. Ct. at 800.

In this case, the Burnam amendment did not draw a new district but instead was limited to making changes only along a portion of the district because of Chairman Darby's rules for amendments. Because of these rules, Burnam and his staff could not have made changes to the district as a whole, though they made changes all along

the western border of HD90 where it adjoined HD99. Most of the other borders of the district were altered in 2011 by the racially motivated changes between Plan H113 and Plan H153 to increase the SSVR of 50% as well. *See* docket no. 1364 ¶ 629 (fact finding describing changes made to HD90 to increase the SSVR in 2011). Taken together, the race-based changes between Plan H113 and Plan H358 affect most portions of the district and thus the design of the district as a whole, and the changes unquestionably involve a significant number of voters.

Even accepting Defendant's position that we may consider only the 2013 changes, the Court finds that a significant number of voters were subject to racial classifications and that race predominated as to the district as a whole. It is undisputed that the express racial target of 50.1% SSVR applied to the district as a whole in 2013. And all of the changes made between Plan H328 and Plan H342 were solely motivated by race to achieve that district-wide racial target. We know this ultimately resulted in 7,067 persons being added to HD99 and 7,035 persons being removed from HD90, for a total of 14,102 persons being moved solely as a result of racial gerrymandering.[52] 14,102 is the *minimum* number of voters subjected to racial gerrymandering because that is the number of voters that were ultimately moved. However, the population of the entire border between HD90 and HD99 was considered for movement between

---

[52] These numbers are shown in the Red-100 reports for Plan H328 and Plan H342. In Plan H328, the total population of HD90 was 166,719; in Plan H342 it was 159,684. In Plan H328, the total population of HD99 was 163,406; in Plan H342 it was 170,473. HD90 went from .55% underpopulated to 4.74% underpopulated. HD99 went from 2.52% underpopulated to 1.69% overpopulated.

the districts, and an unknown number of persons were *kept in* their respective districts based on their race, and thus also subjected to racial classifications.

The ideal size of a House district is 167,637, making 14,102 about 8.4% of a district's total population. The Court finds that 14,000 voters (8.4% of ideal district population) is a significant number of voters.[53] And because those voters were assigned into and out of HD90 to meet the district-wide racial target, race was the predominant factor in the design of the district as a whole in 2013.

Defendants ground their defense in the idea that Kenney and Burnam's intent cannot be imputed to the legislature. In Defendants' view, "Kenney's actions cannot be attributed to the Legislature as a whole without evidence that members of the Legislature were aware of the manner in which Kenney drafted the amendment." Docket no. 1526 at 89. Even if this is a correct statement of the law, the legislators who voted for Burnam's amendment were aware of how the district was constructed, or at least aware enough that his intent can be imputed to them. As noted above, Rep. Burnam introduced the amendment by noting "it . . . take[s] the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district." JX-17.3 at S29. Later,

---

[53] The Task Force contends that the total population of the precincts split or moved whole because of race by Burnam's amendment is 33,343 individuals, including an estimated 16,429 registered voters. Docket no. 1530 ¶¶ 49, 180, 181. Defendants do not refute this assertion.

Chairman Darby stated that Rep. Burnam's amendment "br[ought] the numbers back over 50%." *Id.*

Those statements are enough, in our view, to let legislators know they were voting for a racial gerrymander. Rep. Burnam's comments are as naked a confession as there can be to moving voters into and out of districts purely on the basis of race, and we cannot say that statements made on the House floor during the consideration of an amendment cannot fairly put legislators on notice of the contents of the amendment. We therefore reject Defendants' lack of intent argument as to the racial gerrymandering claims.

Having found that race predominated, the Court applies strict scrutiny to the use of race in HD90. Under strict scrutiny, the challenged plan is invalid unless the State shows that it is narrowly tailored to achieve a compelling government interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). For a racial classification to serve a compelling interest, the Legislature must have a strong basis in evidence to support that interest before it implements the classification. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

Defendants have articulated no compelling government interest that the use of race may have been serving other than "avoid[ing] a potential VRA problem." Docket no. 1526 at 89.[54] But such a vague goal is not a strong basis in evidence that the VRA required such use of race. Burnam and Chairman Darby apparently believed that HD90 should have an SSVR above 50%, but

---

[54] The Court's previous opinion and fact findings on the 2011 changes explain why the race-based changes to HD90 in 2011 were not justified by a compelling state interest.

the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA. There is no evidence that any legislator or staffer evaluated racially polarized voting in HD90 or the amendment's effect on Latino voting ability in HD90. Burnam did not consider any changes in election performance or how primary results might change. Tr226 (Burnam). Burnam added that Darby was simply "fixated on the number," meaning the 50% SSVR target. Tr226 (Burnam).

Although Darby explained on the floor that the new plan "brings the numbers back over 50 percent," there was no accompanying explanation for why this could be required. Darby offered no testimony to clarify his remarks at the June 20, 2013 hearing at which the Burnam amendment was adopted. Tr1545 (Darby). Nor did he ever explain the goal of the 50% target or any electoral impact of the amendment to the legislators on the floor.[55] And Darby continually invoked legislative privilege to decline providing any meaningful testimony as to the potential significance of a 50% SSVR threshold or whether he considered any other meaningful election metrics. Tr1545-48, 1550-51 (Darby). As for Kenney, he did not review election data or political data outside of SSVR. Tr645, 671 (Kenney).

In short, there is no evidence showing that the State's use of race in setting and working toward the 50% SSVR target had a strong basis in evidence. Because the use of race in drawing HD90 was not narrowly tailored to

---

[55] The Burnam amendment was not introduced in committee; it was first introduced on the floor, and thus was never considered in committee or in a hearing.

achieve a compelling government interest, the Task Force succeeds on its *Shaw* claim in HD90.

The Court's finding that the Legislature violated *Shaw* rests on changes made to HD90 after Como was moved back into HD90, and thus remedying that violation would not necessarily remedy the Task Force's intentional vote dilution claim premised on the initial decision to include Como in HD90. Accordingly, the Court must decide the Task Force Plaintiffs' intentional vote dilution claim as well.

The Court concludes that the Task Force has failed to carry its burden of showing discriminatory intent to minimize, cancel out, or dilute the Latino vote in HD90. Although there was some evidence indicating that Burnam may have been concerned about drawing a Latino challenger in the Democratic primary, the overall evidence persuasively demonstrates that his motive was not to dilute Latino voting strength but to simply return Como to his district. It was a high turnout neighborhood that had been in the district since its creation and had consistently and overwhelmingly supported him throughout his time as HD90's representative.

Likewise, the evidence shows that Como's residents generally valued having Burnam as their representative and were unhappy with the 2011 change that put them in Geren's district. Dorothy DeBose, president of Como's Neighborhood Advisory Council, said in her letter to Burnam and Geren that "[c]oncern or being steamed is a great understatement of how frustrated and perturbed the Lake Como Community is at the idea of being removed from District 90." D-731. She described this move as a "tragedy," highlighting Como's history in HD90 since 1978. D-731. Both Burnam and Geren knew of

Como's desire to be returned to Burnam's district, and Geren agreed to the change. Despite returning Como, Burnam's amendment took steps to maintain the SSVR of HD90 at above 50%, as he had been directed to, but did not attempt to engineer the changes to dilute performance for Latino-preferred candidates in primaries or general elections. Although the SSVR was reduced from Plan H309, Kenney stated that it could not be increased further given the constraints, Tr649-50, and the Court does not find that Kenney or Burnam reduced the SSVR to dilute Latino voting strength.

In short, the return of Como to HD90, rather than being a purposefully discriminatory device meant to minimize, cancel out, or dilute the Latino vote, was simply meant to bring Como back to its long-held place in HD90, where its constituents wanted to be. Burnam's knowledge that the change might also benefit him against a Hispanic primary challenger does not translate to discriminatory motive on these facts. Accordingly, the Task Force's intentional vote dilution claim in HD90 fails because of a lack of a discriminatory intent.

The Court's prior findings that the Legislature intentionally discriminated with regard to HD90 and HD93 in Plan H283 and the Task Force Plaintiffs' success on their HD90 *Shaw*-claim in Plan H358 require a remedy in Tarrant County.

Summary and Conclusion

As explained in the Order on Plan C235, the Legislature in 2013 purposefully maintained the intentional discrimination in Plan H283. Thus, violations found by this Court in its Order on Plan H283 and not sufficiently altered in Plan H358 now require a remedy,

including specifically in Bell County, Dallas County, Nueces County, and Tarrant County. The Court otherwise rejects Plaintiffs' intentional discrimination and § 2 results claims directed against the 2013 enactment except that it finds a § 2 results claim in Nueces County and a *Shaw*-type violation in HD90 in Tarrant County.

In sum, Harris County, Fort Bend County, and Bexar County require no further changes.

MALC lacks standing to pursue its claims in Midland and Ector Counties, and thus no changes are required there.

In Bell County, the intentional discrimination previously found by the Court must be remedied, affecting the configuration of HD54 and HD55.

In Dallas County, the intentional discrimination previously found by the Court must be remedied, affecting the configuration of HD103, HD104, and HD105.

In Nueces County, the intentional discrimination previously found by the Court must be remedied, affecting the configuration of HD32 and HD34. In addition, the Court finds that MALC has proven a § 2 results violation insofar as two compact HCVAP-majority opportunity districts could be drawn within Nueces County, but MALC has not proven that § 2 requires breaking the County Line Rule to draw such districts.

In Tarrant County, the intentional discrimination previously found by the Court must be remedied, affecting HD90 and HD93. In addition, although the Court rejects the Task Force's intentional vote dilution claim in HD90, the Court finds that the Task Force established its *Shaw*-type racial gerrymandering claim for the district. That violation also requires a remedy.

It is therefore ORDERED that the Office of the Attorney General file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered.

If the Legislature does not intend to take up redistricting, the Court will hold a hearing to consider remedial plans beginning on **September 6, 2017 at 8:30 a.m.** in Courtroom 1. In preparation for the hearing, the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide plans that remedy the violations listed above.

The parties must confer and address objections and concerns, to the extent possible, prior to the hearing. If both sides agree upon a remedial plan, they should notify the Court, but the hearing will nevertheless proceed so the parties can present the plan on the record. If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing. Plaintiffs and Defendants will be permitted to offer up to four alternative remedial plans per side, and Plaintiffs may (but are not required) to jointly offer plan(s).

The parties should consult with Texas Legislative Council, to the extent necessary, to upload their proposed remedial plans into DistrictViewer and ensure that all relevant data is available to all parties and the Court. If the parties intend to rely on data or analysis that is not available through TLC, they must provide that data to all other parties as soon as that data is available.

It is further ORDERED that Texas Legislative Council staff be present at the remedial hearing for technical assistance in the parties' presentation of their

proposed plans through DistrictViewer or other available means.

SIGNED this 24th day of August, 2017,

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX C

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.,	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN H283

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

Circuit Judge Smith, dissenting

XAVIER RODRIGUEZ, District Judge and ORLANDO L. GARCIA, District Judge:

This Order addresses Plaintiffs' claims concerning Plan H283, enacted by the 82nd Legislature in 2011. Plaintiffs assert "results" claims under § 2 of the Voting Rights Act ("VRA"), intentional vote dilution claims under § 2 of the VRA and the Fourteenth Amendment, and *Shaw*-type racial gerrymandering claims under the Equal Protection Clause of the Fourteenth Amendment. The Perez, LULAC, and MALC Plaintiffs also assert one person, one vote claims under the Equal Protection Clause of the Fourteenth Amendment based on population deviations among the districts. This opinion is intended to be read in conjunction with the Court's fact

findings, which are issued separately, as well as the Court's opinion on Plan C185 (docket no. 1339).

I. VRA § 2 results claims generally

The Task Force, NAACP Plaintiffs, and MALC[1] assert § 2 results claims on the basis that Texas could have enacted a plan with more minority opportunity districts (both single-minority and coalition) than were contained in Plan H283 and that enacting a plan with such additional districts was required by the § 2 results test. In their Fourth Amended Complaint, the Task Force Plaintiffs allege that "Plan H283 fails to create at least three additional Latino-majority House districts that afford Latinos the opportunity to elect their preferred candidate." Docket no. 891 ¶ 37; *see also id.* ¶ 68 ("The Latino population of Texas is sufficiently geographically compact to comprise the majority of citizen voting age persons in at least 33 Texas House districts."). They also assert so-called "nudge factor" claims against two HCVAP-majority districts in Plan H283, HD117 in Bexar County and HD78 in El Paso. Docket no. 1282 at 4-5.

The Task Force Plaintiffs contend that "Latinos are sufficiently numerous and compact to comprise the citizen voting age majority in more districts than contained in Plan H283, including in Harris County, Nueces County, and the Rio Grande Valley." Docket no. 1282 at 4. However, somewhat inconsistently, they offer Plan H292 as a demonstration plan, asserting that it has 34 Latino opportunity districts, created by restoring HD33 in

---

[1] The United States asserts only intentional vote dilution claims under § 2, and does not pursue any § 2 results claims. As discussed below, the Court finds that the Perez Plaintiffs are not asserting § 2 results claims, though the pleadings are not entirely clear.

Nueces County, "balancing" the Latino population in Bexar County to restore HD117, "balancing" the Latino population in El Paso to add HD78, and adding a Latino opportunity district in the Rio Grande Valley by combining population overages from Cameron and Hidalgo Counties to capture the "organic" district that grew in the Valley. Docket no. 1282 at 6; docket no. 444 at 20.[2] Defendants correctly note that "only 32 districts exceed 50% HCVAP or SSVR" in Plan H292. Docket no. 468 at 19.

The NAACP's Third Amended Complaint alleges that the Texas Legislative Black Caucus introduced a plan with four additional African-American opportunity districts (Plan H202), and alleges a § 2 results claim. Docket no. 900 ¶¶ 22, 58; *see also* docket no. 406 at 30 (arguing that four additional minority opportunity districts could have been drawn compared to the enacted plan).[3]

---

[2] The Task Force also points to this Court's interim plan, Plan H309, arguing that it has 34 Latino opportunity districts (including HD35 in the Valley, HD78 in El Paso, HD117 in Bexar County, and HD144 in Harris County). Docket no. 1282 at 8. However, this Court did not reach the merits of the § 2 claims when fashioning the interim map, and did not make findings that any districts were required by § 2. Therefore, Plan H309 is not a valid demonstration map absent further evidence supporting the *Gingles* factors.

[3] The Court notes that the NAACP Plaintiffs have not been consistent in their assertions concerning which districts they propose as additional minority districts in their demonstration plan, Plan H202. In their Third Amended Complaint, they note that the Texas Legislative Black Caucus tendered Plan H202 during the session and that "[t]he new districts created by the Legislative Black Caucus were State House District 26 in Fort Bend and Harris County, State House District 54 in Bell County, State House District 107 in Dallas County, and State House District 114 in Tarrant County." Docket no.

MALC also asserts § 2 results claims and contends that up to six additional minority opportunity districts were required. Docket no. 897 ¶¶ 74-75; docket no. 412 at 16-18. MALC has offered numerous demonstration maps, including statewide Plans H201, H205, H295, and H329, and various limited plans for certain geographic areas.

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). Generally, to evaluate this claim, it must be determined how many "reasonably compact districts with a sufficiently large minority population to elect candidates of its choice" exist in Plan H283, and whether Plaintiffs have demonstrated that more were required, which is usually done through presentation of demonstration plans. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("*De*

---

900 at ¶ 22. In their 2011 Trial Brief, they asserted that Plan H202 had four new minority opportunity districts—HD72 in Hidalgo County as a Latino opportunity district; HD107 in Dallas County as a coalition district; HD114 in southeast Tarrant County as a coalition district; and HD132 in west Harris County as a coalition district. Docket no. 288 at 10; *see also* Tr813-14 (Turner) (discussing HD114). In their 2011 and 2014 Post-Trial Briefs and proposed Findings of Fact, the NAACP Plaintiffs focus only on HD26 in Fort Bend County, HD54 in Bell County, HD107 in Dallas County, and HD149 in Harris County as their proposed additional four districts. Docket nos. 406 at 30, 408 FF31-45, 1280 at 31-39, & 1281 FF121-134, 146-167. The Court will therefore likewise focus on these four districts. Further, although the NAACP Plaintiffs supported Plan H214 as an interim plan, *see* docket no. 441, they do not brief it as a demonstration *Gingles* plan, and thus the Court does not consider it.

Grandy requires a comparison between a challenger's proposal and the 'existing number of reasonably compact districts.'"). Because Plaintiffs are alleging § 2 claims based on the number of opportunity districts statewide, analysis of the claims should involve a comparison between the number of opportunity districts in the enacted plan (Plan H283) and a *Gingles* demonstration plan proposed by Plaintiffs. While normally this would be a straightforward task, it is not in this case.

This task is made complicated by numerous factors, including that: (1) it remains unclear whether the Perez Plaintiffs are asserting § 2 results claims despite offering statewide demonstration Plan H232 and several limited-area demonstration plans[4]; (2) the parties (including the Plaintiffs among themselves) disagree concerning which districts in the enacted plan are opportunity districts; (3) even single Plaintiffs present conflicting assertions concerning which districts they are alleging to be additional opportunity districts; (4) some Plaintiffs fail to clearly set out specifically all the districts they contend are opportunity districts either in the enacted plan or their demonstration plan (or both), asserting only that

---

[4] The Perez Plaintiffs' Sixth Amended Complaint (docket no. 960) is somewhat ambiguous concerning whether they assert § 2 results claims against Plan H283 or only intentional vote dilution claims. Although during this litigation they offered demonstration Plan H232, a plan offered by Rep. Coleman during the legislative session, they do not provide any briefing relevant to § 2 results claims. Further, their Complaint speaks only in terms of intentional discrimination and intentional vote dilution. Accordingly, the Court will treat the Perez Plaintiffs as not bringing any § 2 results claims, and will review their claims only as part of the intentional vote dilution claims analysis. Demonstration plans are relevant to determining dilutive effects for intentional vote dilution claims.

more could have been drawn; (5) Plaintiffs and Defendants disagree on how to determine whether a district is a minority opportunity district and both incorrectly assert that districts with less than 50% minority CVAP are opportunity districts in some instances; (6) many of Plaintiffs' experts reports and analyses focus on VAP instead of CVAP; and (7) certain demonstration plans contain 25 districts in Harris County, compared to 24 in Plan H283, making comparisons outside of drop-in counties more difficult.[5]

The Court finds that certain of the § 2 results claims are moot, given the Legislature's adoption of the interim plan, with slight modifications, in 2013. Plan H309 and Plan H358 resolved some of the § 2 results claims, and no § 3(c) relief would be available based on any proven violations of the § 2 results claims. Given these facts, as well as the complicating factors listed above, the Court concludes that it would be a waste of the Court's resources to delve into significant detail into all of the § 2 results claims with regard to Plan H283. Instead, because the Legislature adopted a new plan in 2013, the parties will be permitted to bring their § 2 results claims concerning the 2013 plan based on more recent ACS data. However, the

---

[5] As will be discussed, the Court concludes that because the 2013 adopted plan currently in effect has 24 districts yet includes the additional opportunity districts Plaintiffs contend are required, results claims relying on a 25-district map for Harris County are moot. Because HD149 could be maintained and an additional opportunity district could be drawn in Harris County with 24 districts, the Court finds that the 24-district plans are appropriate demonstration plans for the results claims, while the 25-district plans are not appropriate demonstration plans outside of the drop-in counties because the number of rural counties differs from Plan H283.

Court will offer some analysis of the 2011 plan § 2 results claims to give preliminary guidance to the parties for the 2013 plan trial and as necessary where the claims relate to the Plaintiffs' intentional vote dilution claims.

A. How to measure opportunity districts

For both the enacted plan and Plaintiffs' demonstration districts, Defendants contend that opportunity districts are measured solely on demographics. For the enacted plan, Plaintiffs contend that they are determined by demographics coupled with a functional analysis including election analysis. Some Plaintiffs (such as the Task Force Plaintiffs) also apply a functional analysis to their proposed demonstration districts, though some Plaintiffs (MALC and the NAACP) appear to rely more on meeting the demographic threshold for demonstration districts.[6]

Some Plaintiffs challenge specific majority-HCVAP districts as not providing real electoral opportunity and not being Latino opportunity districts—specifically, the Task Force Plaintiffs challenge HD78 in El Paso and HD117 in Bexar County under § 2 for both results and intent, and the United States contends that HD35 and HD41 are not opportunity districts as part of its

---

[6] For example, the Task Force uses Dr. Engstrom's election index (with the criteria of 50% wins) to determine whether a district, either in the enacted plan or their proposed plan, is an opportunity district. Using this metric, the Task Force includes some districts as "Latino opportunity districts" in Plan H292 that do not meet the demographic majority-HCVAP threshold. MALC, on the other hand, appears to focus more on reaching the majority-HCVAP threshold to classify districts in its proposed plans as opportunity districts, although it generally also offered some evidence to support a finding that such districts could perform for Latinos.

intentional vote dilution claims.[7] As this Court held in its congressional plan opinion, Plaintiffs may bring results claims against a particular district despite its majority-HCVAP status; the fact that a district is majority-HCVAP does not, standing alone, qualify it as a Latino opportunity district, and Plaintiffs may attempt to prove that it lacks "real electoral opportunity." Similarly, as discussed in the congressional plan opinion, the Court views exogenous election indices in enacted districts as probative evidence of whether a district is an opportunity district, but declines to measure whether a district is an opportunity district based solely on a 50% win standard on such indices. Rather, the Court conducts a practical, searching inquiry based on the totality of circumstances and the particular facts of the case to determine whether any particular district is an opportunity district for § 2 purposes.

In their 2011 proposed Fact Findings and Conclusions of Law, Defendants assert that Plan H283 contains 30 Latino opportunity districts and 12 African-American opportunity districts. Docket no. 413 FF93, 94. Defendants' count of Latino opportunity districts is based

---

[7] The United States' Complaint in Intervention alleges that Plan H283 reduced the number of minority ability to elect districts (a § 5 standard) from 50 in the benchmark to 45. Docket no. 907 ¶ 50. Its post-trial briefing refers to a reduction in the number of minority opportunity districts (the § 2 standard) from 50 to 45 or 46; it views the status of HD41 as unclear due to the number of precinct splits in the district. See, e.g., docket no. 1279 at 36. The United States challenges HD35, HD41, and HD117 as no longer being ability to elect or opportunity districts. Docket no. 907, docket no. 1279. The Court notes that the United States' expert Lisa Handley used the terms "ability to elect" and "opportunity to elect" interchangeably and applied the same standard to both. TrA599 (Handley).

solely on the number of districts with 50% or more HCVAP from the Red-106 Report. Docket no. 413 FF93.[8] As discussed, a 50% HCVAP district is theoretically an opportunity district, but it may still be challenged by Plaintiffs as not providing real electoral opportunity.

Although Defendants' fact findings also cite the Red-106 report (the ACS Special Tabulation of CVAP) as support for the number of African-American opportunity districts, the Appendix to the post-trial brief states that Defendants' criterion for African-American opportunity districts is 40% BVAP. Docket no. 411 Appendix at Table 5 n.1.[9] Using the 40% BVAP criteria, Defendants list the following as "African-American districts": HD22, HD27, HD95, HD100, HD109, HD110, HD111, HD131, HD139, HD141, HD142, and HD146.[10] Docket no. 411 Appendix. Defendants claim that no proposed map creates more African-American districts using the 40% BVAP criterion. Defendants' use of 40% BVAP appears to be based on the position taken by mapdrawers and

---

[8] Although Defendants rely on 50% HCVAP in their briefing, it is clear that Interiano, the primary mapdrawer of the House plan, and other redistricters used a 50% SSVR standard for Latino opportunity districts when drawing the House plan. This was partly due to the fact that HCVAP data was not available when they initially began drawing districts (though it was available before the plan went to the floor) and the fact that SSVR data was available in RedAppl.

[9] That Defendants use 40% BVAP as the measure for African-American opportunity districts is confirmed by their proposed fact findings filed during the interim plan proceedings. *See* docket no. 627 FF135.

[10] All of these districts are also above 40% BCVAP, but three (HD27, HD95, and HD100) are below 50% BCVAP, although HD95 is within the margin of error. In addition, HD147 has a BCVAP of 47.4% but its BVAP is only 38.2%, so Defendants did not include it as an "African-American district."

redistricters, despite the fact that Defendants agree that Supreme Court case law has established a majority (over 50%) requirement for minority opportunity districts under § 2. The Court thus finds Defendants' reliance on a 40% BVAP threshold for African-American opportunity districts to be erroneous.[11] Rather, for single-minority opportunity districts, the standard for a minority opportunity district is majority CVAP for the particular minority group.

B. Whether § 2 can require coalition districts

Defendants further contend that minority coalition districts are never required or protected by § 2, and thus they do not count them in any of their analyses. However, Plaintiffs assert that coalition districts can be required and propose certain coalition districts in their *Gingles* demonstration plans. The Court agrees with Plaintiffs that § 2 can require the creation of minority coalition districts.

The Court in *Gingles* "ha[d] no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.12 (1986). Several cases presented this issue after *Gingles*, but the Supreme Court declined to address the issue and resolved the cases on other grounds.

---

[11] Although it may be true that 40% BVAP districts usually perform for African-American voters, this has to do with the composition of the rest of the district's population. Usually such districts are in mixed-race areas, where significant Hispanic population contributes to the performance for African-American voters. But the 40% BVAP criterion, standing alone, cannot make the district an African-American opportunity district.

In *Growe v. Emison*, 507 U.S. 25 (1993), the district in question was composed of minority voters from three different minority groups, including Native Americans. The Supreme Court noted that "*Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. We do not reach that question in the present case either." *Id.* at 41 n.5 (citations omittted). Again, in *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994), the Supreme Court stated, "As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases."

In *LULAC v. Perry*, 548 U.S. 399, 443 (2006), the Court, as it had "done several times before," assumed without deciding "that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population." *Id.* at 443 (Kennedy, J., writing for a plurality). However, Justice Souter opined that it was time to recognize that "the integrity of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be." *Id.* at 485 (Souter, J., concurring in part and dissenting in part).

The Supreme Court did address the issue of crossover districts in *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion). In *Strickland*, state house district 18 had been majority minority, but the African American voting age population had fallen below 50%, and it was no longer possible to draw a geographically compact majority-minority district. *Id.* at 8. The North Carolina

legislature split a county in an effort to give "African-American voters the potential to join with majority voters to elect the minority group's candidate of choice." *Id.* Thus, the following question was posed to the Court: "In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?" *Id.* at 6. Justice Kennedy acknowledged that it had "declined to decide the minimum size minority group necessary to satisfy the first [*Gingles*] requirement . . . [but] [w]e must consider the minimum-size question in this case." *Id.* at 12 (Kennedy, J.). The plurality made clear at the outset that it was only addressing the issue as it pertains to crossover districts; it was not addressing coalition districts. As Justice Kennedy explained:

> In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts. At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that § 2 does not require the creation of influence districts.
>
> The present case involves an intermediate type of district—a so-called crossover district. Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potetially, is large enough to elect the candidate of its choice with help from voters who are members of the

> majority and who cross over to support the minority's preferred candidate. This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. We do not address that type of coalition district here.

Id. at 13-14 (citations omitted).

After considering the parties' arguments, the Court held that crossover districts are not protected under § 2. *Id.* at 14-15. However, the scope of the ruling was clarified in several ways. First, the ruling did not apply to coalition districts, as the Court was not addressing that issue. *Id.* at 13-14. The Court also made clear that "[o]ur holding does not apply to cases in which there is intentional discrimination against a racial minority," and "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 20, 24. The Court stated, "Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." *Id.* at 23. While legislatures have a choice to draw such districts, § 2 "does not mandate creating or preserving crossover districts." *Id.*

Although the *Strickland* decision may provide some guidance on crossover districts, the Supreme Court has not yet addressed coalition districts—those electoral districts in which two or more minority groups form a

coalition to elect the candidate of their choice. While each minority group individually may not be able to meet the first *Gingles* precondition, they may be able to meet the criteria when combined as a coalition. Coalition districts are different from crossover districts, in which minorities require the help of white crossover voters to elect their candidate of choice. Minority voters in coalition districts do not rely on white crossover votes in order to elect the minorities' candidate of choice.

Again, the Court in *Strickland* clearly stated that it was not addressing coalition districts. *Id.* at 13-14. The Court very carefully distinguished crossover and coalition districts and cautioned against confusing the two. *Id.* at 13. However, the Court's later decision in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam) may have created some of the confusion that the Court cautioned against in *Strickland*. In referring to a new congressional district in this Court's interim redistricting plan, the Court in *Perez* stated, "If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so. *Cf. Bartlett v. Strickland*, 556 U.S. 1, 13-15, 129 S. Ct. 1231, 173 L.Ed.2d 173 (2009)(plurality opinion)." 565 U.S. at 399. The meaning of this statement, the use of the "*Cf.*" signal, and the reliance on *Strickland* is unclear, given that *Strickland* did not address coalition districts. If the Court meant that there was no factual basis for drawing the district, there would be no need for a citation in support. If the Court meant that there was no legal basis for drawing the district, *Strickland* provides no support because the opinion expressly states that it does not apply to coalition districts. In any event, the Court's statement in *Perez* provides no guidance on the

issue of whether the majority-minority requirement under the first *Gingles* precondition mandates that a single racial or ethnic group (*e.g.*, Hispanic or African American, but not a combination of both) constitute a majority of the citizen voting age population or whether the first *Gingles* precondition may be satisfied when minorities from more than one racial or ethnic group, when joined together, constitute a majority of the citizen voting age population.

The Fifth Circuit addressed this issue more than twenty-five years ago and recognized that minority groups may be aggregated to meet the first *Gingles* precondition. In *LULAC v. Midland ISD*, 812 F.2d 1494, 1500 (5th Cir.), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987), the Fifth Circuit approved of the manner in which African Americans and Hispanics were joined together as a compact minority group "capable of carrying a district." The Fifth Circuit reached the same result one year later in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988)). In *Campos*, the district court found that a minority group composed of both African Americans and Hispanics was sufficiently large and geographically insular to form a majority in a single-member district. The district court also found that "Blacks were cohesive, Hispanics were cohesive, together the minority group was cohesive, and that Anglos voted sufficiently as a bloc to usually defeat the minority's preferred candidate." *Id.* at 1242. The district court reviewed the totality of the circumstances, considering the relevant factors, and concluded that vote dilution had occurred and a violation of § 2 had been established. *Id.* On appeal, the Fifth Circuit found that the district court's

finding that the first *Gingles* requirement was satisfied was not clearly erroneous, and explained:

> There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics. Section 1973(a) protects the right to vote of both racial and language minorities. . . . If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters.

Id. at 1244 (citations omitted). The Court in *Campos* also explained, however, that the plaintiffs must prove that the minorities "actually vote together" in a cohesive manner; otherwise, their claim will fail. "The key is the minority group as a whole. . . . If the evidence were to show that the Blacks vote against a Hispanic candidate, or vice versa, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown." *Id.* at 1245. Because the Campos plaintiffs showed that African Americans and Hispanics, as a minority group, were politically cohesive, the district court's findings on the second *Gingles* factor was not clearly erroneous. *Id.* at 1248.

The Eleventh Circuit agreed with the Fifth Circuit's view on coalition districts in *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, 906 F.2d 524, 526 (11th Cir. 1990), stating that "[t]wo minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive

manner." The plaintiffs failed to prove, however, that Black and Hispanic voters in Hardee County were politically cohesive. *Id.* at 526-27. In *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992), the Ninth Circuit assumed that a combined group of Black and Hispanic voters met the first *Gingles* precondition, but held that the minority plaintiffs failed to show political cohesion as required under the second *Gingles* requirement. In *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2nd Cir.), *vacated on other grounds*, 512 U.S. 1283 (1994), the Second Circuit also assumed that coalition districts are covered under § 2. The district court found that "[c]ombining minority groups to form [majority-minority] districts is a valid means of complying with § 2 if the combination is shown to be politically cohesive." 26 F.3d at 275. The circuit court agreed that the first *Gingles* precondition had been met, and found "both testimonial and statistical evidence that African Americans and Hispanics in Bridgeport [were] politically cohesive and that voting in the City [was] remarkably racially polarized." *Id.* at 275-76.

In *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), the Sixth Circuit expressly disagreed with the Fifth Circuit on the issue of coalition districts, thus creating a clear split among the circuit courts. The redistricting plan in *Nixon* included a district with both African-American and Hispanic voters in order to establish sufficient numbers and satisfactory geographical compactness. *Id.* at 1384. The district court granted the defendants' motion to certify the question of whether two protected minority groups may aggregate to pursue a § 2 vote dilution cause of action. *Id.* at 1383. The

circuit court decided that if Congress had wanted to protect a minority group that was composed of more than one race or ethnicity, it would have used more words in the plural form, such as "protected classes" rather than "protected class." *Id.* at 1386-87. Thus, it refused to extend § 2 coverage to a minority group that includes more than one race or ethnicity.

In 2012, the Second Circuit noted that "[t]he circuits are split as to whether different minority groups may be aggregated to establish a Section 2 claim." *Pope v. Cty. of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012). The court ultimately resolved the case on the failure to show racially polarized voting but discussed the first *Gingles* precondition at length and noted that while plaintiffs may choose a more expansive minority group to satisfy the first *Gingles* requirement, it may also add to their burden in demonstrating political cohesion required for the second precondition. *Id.* at 574-77 & n.11.

To summarize, the Supreme Court has not addressed coalition districts, the Fifth Circuit has expressly permitted them, and the Second, Ninth, and Eleventh Circuits have tacitly recognized them. Only the Sixth Circuit has expressly denied § 2 protection to a combined group of minorities under the first *Gingles* requirement. As the Fifth Circuit has stated, "We are a strict *stare decisis* court." *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012). Just as one panel of the circuit court "may not overrule the decision, right or wrong, of a prior panel in the absence of any intervening contrary or superseding decision by the court en banc or the Supreme Court," a district court is bound by a circuit decision unless or until it is overturned by an en banc decision of the circuit court or a decision of the Supreme

Court. *See Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991). In the Fifth Circuit, *Campos* is binding precedent, and this Court must follow it in the absence of any authority to the contrary. Thus, if Plaintiffs can meet their burden of proof in all other respects, their § 2 claim will not fail simply because the minority group in question is composed of more than one race or ethnicity.

This is consistent with the manner in which the Supreme Court has dealt with earlier cases, in which it assumed (without deciding) that it was permissible for the district court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2. *See, e.g., Growe*, 507 U.S. at 41 (unanimous opinion). Rather than impose a strict prohibition, the Supreme Court simply cautioned that "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential." *Id.* (citing *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990); *Campos*, 840 F.2d at 1244).

This is also consistent with the intent of Congress when it amended the Act in 1982. In amending § 2, Congress emphasized the need for courts to undertake a searching practical evaluation of the "past and present reality." S. Rep. 97-417 at *30 (citing *White v. Regester*, 412 U.S. 755, 760-77 (1973)). Coalitions of minority voters are a present reality, and affording them protection under § 2 is consistent with the Congressional goal of keeping political processes "equally open to minority voters." S. Rep. 97-417 at *2. Minorities must still "pull, haul, and

trade to find common political ground," *De Grandy*, 512 U.S. at 1020, and they will not meet the second *Gingles* precondition if they do not. But once that has been achieved and the minority voters, when combined, constitute a majority, the first *Gingles* precondition is also satisfied. The bottom line is that every case is different, and "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 156, 158 (1993). Thus, this Court follows the Fifth Circuit and holds that § 2 can require the creation of coalition districts, provided that the *Gingles* criteria (and totality of the circumstances) are satisfied as to the coalition.

C. Whether the VRA can require the State to violate the County Line Rule[12]

It is undisputed that mapdrawers did not create certain opportunity districts even though the proposed districts met their population thresholds because they felt that doing so would have required a County Line Rule violation. In their briefing, Defendants argue that requiring the Legislature to violate the County Line Rule to comply with § 2 would violate the Equal Protection

---

[12] The Texas County Line Rule is contained in Article III, § 26 of the Texas Constitution and provides that "whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

Clause and the *Shaw v. Reno* line of cases because they would be subordinating traditional redistricting principles to race. Docket no. 1295 at 54-55; docket no. 996 (Motion for Summary Judgment) at 28-31. The Court disagrees.

The Supremacy Clause generally requires that state laws that are inconsistent with federal laws must yield to the federal law. As a result, it is well established that state constitutional principles such as the County Line Rule must yield to the Equal Protection Clause's one-person, one-vote requirement. *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009) ("It is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution."). Mapdrawers recognized this requirement by splitting one county in the map to maintain an overall deviation below 10%, but they asserted that this was the only county cut permitted by law. And although the TLC had advised that the County Line Rule would also have to yield to the VRA and Texas had itself taken this position in prior redistricting litigation,[13] redistricting leadership flatly rejected that position.

In *Strickland*, the Supreme Court considered the question "whether § 2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the

---

[13] *See, e.g.*, D-124 (Hanna's County Line Rule presentation advising that the County Line Rule would have to yield to the VRA); D-128 at 142 (Hanna's guidance book on redistricting for the Legislature, noting that the State argued in *Clements v. Valles* that it was required to violate the County Line Rule to comply with the VRA); *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981).

Whole County Provision" in North Carolina's Constitution. 556 U.S. at 7. The Court then stated, "That, in turn, depends on how the statute is interpreted." *Id.* The Court noted that § 2 "can require the creation of [majority-minority] districts" but concluded that the VRA did not require the particular district at issue to be drawn because the plaintiffs had failed to establish the first *Gingles* precondition under the Court's newly established majority standard. *Id.* at 13-15. Thus, because the district was not required by § 2 in that case, the Supreme Court did not directly decide the initial issue of whether § 2, when satisfied, could have required the state to draw a district in violation of the Whole County Provision. Nevertheless, such a conclusion is implied, given that the Court could simply have held that § 2 could not require any district to be drawn in contravention of the Whole County Provision, regardless of how the statute is interpreted and regardless of whether § 2 requirements were satisfied, rather than determining whether § 2 required the district in the first instance.

Nevertheless, Defendants argue that the "Legislature's adherence to the Texas Constitution was not only a rational exercise of race-neutral policy; it was essential to avoid a violation of the Equal Protection Clause" and that Plaintiffs' "suggesting that the [VRA] compels subordination of traditional redistricting principles to race, would simply redirect the strict scrutiny analysis to section 2 itself." Docket no. 411 at 38-39. Defendants contend that Supreme Court jurisprudence holds "beyond question that traditional redistricting principles cannot be subordinated to race without running afoul of the Fourteenth Amendment." *Id.*

at 39-40. However, the Supreme Court's Equal Protection cases debunk this argument.

Justice O'Connor, writing for a plurality, held that, assuming compliance with § 2's results test is a compelling state interest (this Court holds that it is), the "narrow tailoring" requirement of strict scrutiny allows states a limited degree of leeway in furthering such interests—"[i]f the State has a 'strong basis in evidence' for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race 'substantially addresses the § 2 violation,' it satisfies strict scrutiny," meaning that it operates as a defense to a charge of racial gerrymandering. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). Further, the plurality noted, the "district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 979. On its face, this language makes clear that traditional districting principles may be subordinated to race when necessary to avoid § 2 liability (but no more than necessary).

Similarly, the Fifth Circuit has held that a majority-minority district "is constitutional if the State has a 'strong basis in evidence' for concluding that the three *Gingles* preconditions are present and if the district drawn in order to satisfy § 2 does not 'subordinate traditional districting principles to race substantially more than is "reasonably necessary" to avoid § 2 liability.'" *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1407 (5th Cir. 1996); *see also id.* at 1406 ("a tailored response to a found [§ 2] violation must use race at the expense of traditional political concerns no more than is reasonably

necessary to remedy the wrong"). Thus, traditional districting principles such as the County Line Rule may be subordinated to race to remedy a § 2 violation, so long as it is no more than reasonably necessary to comply with § 2.[14] *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S.

---

[14] There are also other cases in which the Supreme Court and Fifth Circuit have recognized that the County Line Rule (and similar rules from other states) must yield to the VRA. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1302-04 (Rehnquist, C.J.) (denying North Carolina's application for a stay of a state supreme court order that required, in part, "the new plan 'must preserve county lines to the maximum extent possible, except to the extent counties must be divided . . . to comply with Section 2 of the Voting Rights Act'"); *LULAC v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) (finding that a county could not intervene in redistricting litigation for the purpose of "objecting to the proposed reduction of the district size in violation of Texas law" because "[i]f the present district lines are found to violate the Voting Rights Act and/or the United States Constitution, Texas' constitutional and statutory provisions protecting district lines will be nullified under the Supremacy Clause").

In addition, numerous courts have recognized the broader possibility that state election laws of any sort should yield to the VRA by operation of the Supremacy Clause. *See Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, *to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.*" (emphasis added)); *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) ("We hold that . . . by force of the Supremacy Clause, Article VI, the New York English literacy requirement [as a precondition to the right to vote] cannot be enforced to the extent that it is inconsistent with § 4(e) [of the VRA]."); *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (noting a plan's drafter's "disregard[ing] the requirements of the Ohio Constitution where he believed that the [VRA] required a contrary result" demonstrated his "obedience to the Supremacy Clause"); *State of S.C. v. Katzenbach*, 383 U.S. 301, 333–34 (1966), *abrogated by Shelby Cty., Ala. v. Holder*, 133 S. Ct.

Ct. 788 (2017) (affirming district court's finding that although race predominated in the drawing of District 75, the district survived strict scrutiny because the legislature's use of race was narrowly tailored to complying with § 5 of the VRA).

Defendants' position conflates the two steps of a *Shaw*-type Equal Protection analysis. When a party asserts a claim under *Shaw* that a districter has racially gerrymandered a district, the first inquiry is whether traditional redistricting principles are subordinated to race such that racial criteria predominated; if so, strict scrutiny is triggered. In Defendants' view, the first step would be the end of the inquiry. However, as discussed above, strict scrutiny allows the use of race when narrowly tailored to further a compelling state interest, such as complying with the VRA. Accordingly, strict scrutiny permits the subordination of traditional redistricting principles to race insofar as reasonably necessary to avoid § 2 liability and/or remedy the wrong.

2612 (2013) (recognizing that the VRA could remedy a state constitution's violation of the Fifteenth Amendment, such as improperly used literacy tests); *Lopez v. Monterey Cty., Cal.*, 871 F. Supp. 1254, 1258 (N.D. Cal. 1994) ("Under the Supremacy Clause, the implementation of relief for a violation of the Voting Rights Act must take precedence over enforcement of state law that stands in the way of effective relief.") (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1047 n.21 (D. Md. 1994) ("Plaintiffs are correct in arguing that state statutes or constitutional provisions that result in violations of the U.S. Constitution or the Voting Rights Act are preempted by federal law. On the other hand, it is self-evident that a state plan should—indeed must—comply with state statutory and constitutional mandates if compliance with those mandates does not violate federal law" (internal citations omitted)).

While states choosing to draw districts may avoid strict scrutiny under the Equal Protection Clause by respecting their own traditional districting principles and the states retain "'discretion to apply traditional districting principles,' in majority-minority, as in other, districts," *Bush*, 517 U.S. at 978, this does not mean that they may claim that a single traditional districting principle such as the County Line Rule allows them to avoid drawing districts required by § 2 under the totality of circumstances.[15] Thus, the Court rejects Defendants' argument that the VRA cannot require the Legislature to violate the County Line Rule.

The Court will thus consider Plaintiffs' § 2 results claims and *Gingles* maps, including those that create purported coalition districts and that violate the County Line Rule. However, the Court emphasizes that the VRA requires the County Line Rule to be subordinated only to the extent reasonably necessary to remedy a § 2 violation.

---

[15] Two district courts have recently rejected Defendants' same argument. The court in *Georgia State Conference of NAACP v. Fayette County Board of Commissioners*, 950 F. Supp. 2d 1294 (N.D. Ga. 2013), *vacated on procedural grounds*, 775 F.3d 1336 (11th Cir. 2015), observed, as does this Court, that Defendants' argument "ignores the applicable framework of an equal-protection claim" and that, upon a finding that a plan subordinates traditional districting principles to race, "the district is not simply rejected as a racial gerrymander" but instead "the court applies strict scrutiny." *Id.* at 1304. The court further noted that Defendants' position "would have the Court collapse an equal-protection inquiry into the first *Gingles* prong" but "the court must first determine whether *Gingles* is met before ensuring that the proposed remedy complies with the Equal Protection Clause." *Id.* at 1305. The court in *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1401 (E.D. Wash. 2014) also rejected Defendants' position for "the reasons so cogently explained in *Fayette County*."

Accordingly, Plaintiffs' demonstration maps should attempt to honor the County Line Rule to the extent doing so is consistent with the VRA.

II. Intentional Vote Dilution and Select § 2 Results Claims by Geographic Area

The Court applies the analytical framework for intentional vote dilution claims under § 2 of the VRA and the Fourteenth Amendment as discussed in the congressional plan opinion. For § 2 results claims, the Court applies the *Gingles* framework, including as discussed above.

The United States asserts intentional vote dilution claims with regard to the entire plan, but points to specific districts as proof of intent, including districts in the Rio Grande Valley (including specifically HD41), HD35, Nueces County, El Paso (HD77 and HD78), Dallas County (HD103, HD104, and HD105), Bexar County (HD117 and HD118), and Harris County (HD137 and HD149). Docket no. 1304 at 2 n.1. The United States relies on circumstantial evidence as well as direct evidence, including: (1) the nudge factor emails and evidence that the nudge factor was implemented in certain Latino opportunity districts that elected an Anglo-preferred candidate in 2010; (2) racially focused statements by legislators and districting insiders showing they thought and spoke in terms of race; and (3) precinct splits, including the high number of splits in general (412 in Plan H283) and the indication that many splits were racial and indicate the use of race as a proxy for partisanship given that accurate political information is not available below the precinct level, while racial data is. Docket no. 1279 at 11-14.

The Perez Plaintiffs also complain that Plan H283 "intentionally discriminated against minority voters." Docket no. 960 ¶ 28. They (joined by the NAACP Plaintiffs) specifically allege such discrimination in Dallas County, Tarrant County, Harris County, Bell County, McLennan County, Fort Bend County, Nueces County, Bexar County, and HD41. *Id.*; ; docket no. 1303; docket no. 601. The NAACP alleges that Plan H283 was developed with the intent to disadvantage African-American and other minority voters. Docket no. 900 ¶ 62.

MALC challenges Plan H283 as a whole as intentionally diluting Latino voting strength by failing to draw new opportunity districts despite the population growth, using the County Line Rule to avoid drawing minority opportunity districts required by § 2 and diminishing Latino voting strength, packing and cracking politically cohesive Latino and minority communities, manipulating population, and racial gerrymandering. Docket no. 897 ¶¶ 2-10. MALC also specifically alleges that mapdrawers: pretextually used the County Line Rule to avoid drawing a new Latino opportunity district in the Midland/Odessa area of West Texas (¶ 38); eliminated a Latino opportunity district in Nueces County (¶ 42); failed to draw an additional Latino opportunity in Harris County (¶¶ 47-48); failed to provide minority opportunity in Fort Bend County and unnecessarily fragmented the minority population there to minimize its political strength (¶ 51); failed to draw an additional minority opportunity district in Bell County and intentionally fragmented the minority community in Killeen to minimize its political impact (¶¶ 54, 56); intentionally fragmented minority population while at the same time overpopulating Latino majority districts in Dallas

County, leading to the failure to create at least one and possibly two additional minority opportunity house districts in Dallas County (¶ 57); impermissibly focused on race and targeted low-turnout Hispanic voters for inclusion in HD117 in Bexar County to protect incumbent Republican John Garza (¶ 58); and drew the border between HD77 and HD78 in El Paso with racially discriminatory intent (¶ 59).

Defendants assert that the mapdrawers' application of the County Line Rule is not evidence of intentional vote dilution because it was a consistently applied neutral, traditional districting principle. Docket no. 457 at 68. Defendants further generally deny any improper use of race, arguing that any consideration or use of race was only as needed to comply with the VRA.

A. El Paso County

Plaintiffs assert that the El Paso County configuration, particularly HD77 and HD78, is evidence of intentional vote dilution. Plaintiffs assert "nudge factor" claims against HD78 and contend that it intentionally does not provide Latinos equal opportunity in an effort to protect the Republican incumbent Dee Margo. Plaintiffs also assert that five compact Latino opportunity districts should have been drawn in El Paso County compared to only four opportunity districts in Plan H283. Although the HCVAP of HD78 is over 50% (55.2%), Defendants admit that "Plan H283 did not create an additional majority-Latino district in El Paso," docket no. 413 FF71, presumably because it did not meet their 50% SSVR threshold even though it was (and all four other districts in El Paso County were) over 50% HCVAP.

The United States asserts that mapdrawers' intentional refusal to create a fifth Latino opportunity district in El Paso, even though it could be done without violating the County Line Rule or other traditional districting principles, and instead making a "policy choice" to protect the Anglo incumbent was intentional vote dilution. Docket no. 1279 at 36, 39-40. To do this, the United States argues, Downton manipulated the SSVR in HD78 and analyzed election data to ensure that the Hispanic candidate of choice was unlikely to be elected. Docket no. 1279 at 40.

The Task Force Plaintiffs argue that the Latino population "could be more evenly spread among all five districts in El Paso County," giving Latinos the opportunity to elect their candidate of choice in all five districts, and that Plan H283 packs Latino voters in El Paso County into the other districts to prevent Latino voters in HD78 from electing their candidates of choice. Docket no. 634 FF458, 459; docket no. 1282 at 2. The Task Force Plaintiffs contend that HD78 in Plan H283 is not a Latino opportunity district but that it could be drawn as an additional Latino opportunity district as in their demonstration Plan H292. Docket no. 1282 at 6.

MALC's Third Amended Complaint notes that the border between HD77 and HD78 has a bizarre shape with deer antler protrusions that split multiple precincts between these two districts. Docket no. 897 ¶ 59. MALC notes that its Plan H205 creates five reasonably compact majority-SSVR and majority-HCVAP districts in El Paso. Docket no. 412 at 18.[16]

---

[16] In the interim plan, the Court remedied the "not insubstantial" § 5 claims in El Paso, finding that this also provided "an appropriate

Defendants assert that the "possibility of creating an additional Latino-majority Democratic district does not obligate the State to create it" and that Plaintiffs have failed to show that the totality of circumstances required such a district, especially given that "Democratic voters are consistently successful in electing their candidates of choice in El Paso County" and "the alleged number of Latino candidates of choice elected to the House from El Paso County—four out of five—is proportional to the Latino percentage of citizen voting age population." Docket no. 457 at 33.

Defendants further assert that the El Paso map was developed and agreed to by the five-member delegation, four of whom were Democrats and members of MALC, and all of whom were elected from HCVAP-majority districts. Docket no. 1249-1 at 10. Defendants point out that under both Plan H100 and Plan H283, all five districts were over 50% HCVAP and all but HD78 were over 50% SSVR, and assert that the levels of both were "substantially similar across both plans." Docket no. 1249-1 at 13. Defendants argue that "there is no evidence that the configuration of HD78 deprives any Latino voter in El Paso County of an 'equal opportunity' to participate in the political process or to elect candidates of their choice" and that, even if Plaintiffs could satisfy all three *Gingles* preconditions, they fail to "prove that the totality of circumstances requires the State to restructure HD78 to unseat the incumbent" because "Latinos are more than

---

remedy for the alleged Section 2 . . . violations." Docket no. 690 at 11. The interim plan increased HD78's HCVAP to 58.3% "to provide minorities the ability to elect the candidate of their choice." *Id.* at 12. The Court finds that the § 2 results claims against the El Paso County districts are moot given the changes in the current plan.

proportionally represented in El Paso County's House delegation,"[17] "[t]he only possible basis for Plaintiffs' claim is the Legislature's failure to maximize Latino representation," and "[t]he Legislature's decision to maintain existing Latino population levels in the district, presumably offering some protection to the incumbent, does not support a finding of vote dilution." Docket no. 411 at 42; *see also* docket no. 457 at 31-32.

The Court finds that Downton reconfigured the border between HD77 and HD78 to intentionally dilute the Latino vote in HD78. Although Pickett, the County delegation dean, submitted two County proposals to Solomons, Downton chose the one that was not preferred by Pickett,[18] and he then made further changes to the

---

[17] As MALC points out, Defendants agree that § 2 proportionality should be evaluated on a statewide basis when Plaintiffs assert statewide vote dilution claims, yet argue that no fifth Latino opportunity district is required in El Paso County because Latinos already have proportional representation with four districts. Docket no. 459 at 3. The Court finds that overall statewide proportionality is the relevant inquiry for Plaintiffs' § 2 claims. To achieve statewide proportionality, Latinos may be over- or under-represented in certain areas of the State. Exact proportionality in every area is not feasible, especially given the operation of the County Line Rule. Thus, while local proportionality is relevant in the totality of circumstances in determining whether an additional Latino opportunity district is required, § 2 proportionality in this case must ultimately be measured on a statewide basis, and over-representation in any given area cannot be the basis for rejecting an opportunity district.

[18] The evidence also indicates that Rep. Marquez may have impermissibly focused on race in making changes to HD77 and HD78 from the initial delegation map supported by Pickett. She specifically moved precincts into her district to increase her SSVR numbers in order to increase her own election chances, but there is no evidence that this was necessary for any compelling state interest such as complying with the VRA. However, the evidence is clear that any

border between HD77 and HD78 without input from the delegation. *See* TrJ2103 (Downton did not incorporate input from Margo or Marquez). The evidence appears undisputed that, after choosing to go forward with the Marquez map from the El Paso County delegation, Downton made further unilateral, race-based changes to the border of HD77 and HD78, ostensibly to address concerns raised by David Hanna about the fact that the SSVR of HD78 had dropped below benchmark levels. Hanna's memo stated that this "risk of retrogression . . . could easily be remedied by swapping some precincts with an adjoining district," especially in light of the disparity in SSVR between HD78 and the other El Paso districts. D-122. However, rather than follow Hannah's advice to increase the SSVR of HD78 by swapping a few precincts, Plaintiffs contend that Downton surgically split precincts and moved individual census blocks between HD77 and HD78, while monitoring election data to ensure that he did not create a Latino opportunity district. Docket no. 1279 (United States Brief) at 39-40. The Court agrees with this assessment.

Although Downton claimed to make these race-based splits with the goal of complying with § 5 by raising the SSVR of HD78 (TrJ2002, TrJ2102), his so-called "compliance" with § 5 was intentionally superficial because he wanted to protect the Republican incumbent elected in 2010, who was not the Latino candidate of choice. Downton's changes were designed to appear to comply with § 5 by increasing the SSVR of HD78, but without increasing or ensuring Latino ability to elect,

---

race-based changes made by Marquez were not made with racially discriminatory intent.

which is the basis upon which § 5 permits such race-based districting actions. Downton's precinct splits were deliberate and based on more than simply increasing SSVR; his purpose was to increase the SSVR while simultaneously ensuring that election success rates remained minimally improved for Latinos.

Downton achieved his purpose by increasing the total SSVR by 1% (and non-suspense SSVR by .9%), while increasing election performance for Latinos by only .3 or .4%. PL-503; D-109. Further, Downton and mapdrawers knew from the OAG 10 that although HD78 remained at 2/10 wins for Latino-preferred candidates, the margin of victory for the two prevailing Latino-preferred candidates had been reduced from the benchmark. US-190; US-190A. This is not compliance with § 5, which looks to numerous factors, including Latino election success, in determining whether a district has "ability to elect," and does not just focus on a single demographic such as SSVR. In fact, increasing the SSVR while at the same time monitoring Latino ability to elect to ensure that it is not correspondingly increased is antithetical to the purpose of § 5 and the VRA and is intentionally racially discriminatory. The changes cannot be excused as mere partisan gerrymandering because of their racially discriminatory nature. Given the existence of racially polarized voting in El Paso County and the totality of circumstances, this manipulation constitutes intentional vote dilution in violation of § 2 of the VRA and the Fourteenth Amendment.

In sum, the § 2 results claims in El Paso County are moot, but the Court finds that mapdrawers intentionally diluted the Latino vote in violation of § 2 of the VRA and the Fourteenth Amendment with regard to HD78.

B. Bexar County

Benchmark HD117 was a Latino opportunity district, electing the Hispanic candidate of choice in three out of the five last endogenous elections. In 2010, it elected Republican John Garza, who was not the Latino candidate of choice. Numerous Plaintiffs contend that the Legislature intentionally diluted Latino voting strength in the district to protect Garza. Plaintiffs[19] argue that HD117 was no longer a Latino opportunity district in Plan H283 despite its majority-HCVAP and majority-SSVR status. The D.C. Court found that HD117 was an ability-to-elect district in the benchmark, but was no longer an ability district in Plan H283. *Texas v. United States*, 887 F. Supp. 2d 133, 170-71 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Based on a preliminary finding that mapdrawers were impermissibly focused on race in trying to make HD117 more Republican, this Court remedied the "not insubstantial" § 5 claim in the interim plan, reconfiguring HD117 to return it to benchmark performance levels. Docket no. 690 at 6.

The Task Force Plaintiffs bring a "nudge factor" claim against HD117 in Bexar County. The United States also asserts a nudge factor claim, arguing that mapdrawers replaced high-turnout Hispanic voters with poor, low-turnout Hispanic precincts to increase Hispanic population levels but decrease SSVR, Hispanic turnout, and Hispanic electoral performance. Docket no. 1279 at 41. MALC also alleges that "[i]n creating a district to safely re-elect Rep. Garza the state impermissibly focused

---

[19] According to their proposed conclusions of law (docket no. 1265), the Perez Plaintiffs allege there is intentional vote dilution in HD117, but it is not briefed in their Post-Trial Brief (docket no. 1263).

on race by targeting low-turnout Latino precincts." Docket no. 897 ¶ 58.

Defendants argue that the Bexar County map was developed by the ten-member delegation, led by Democrats Villarreal and Ruth Jones McClendon. Docket no. 1249-1 at 15. Defendants contend that Garza wanted rural areas because he viewed them as more conservative and more likely to vote Republican, and that he wanted to create a rural, conservative district outside the City of San Antonio[20] to bolster his re-election prospects while maintaining SSVR over 50%, and that this is not evidence of racial animus. Docket no. 1249-1 at 17, 1249-2 at 23 (citing TrJ399 (Garza), TrJ1518, TrJ1523 (Interiano)). Defendants point to Farias's testimony that it was a partisan decision. Docket no. 1272 at 56 (citing Tr353-54).

Defendants argue that Speaker Straus and his staff determined that in order to achieve these goals, HD117 needed to include rural areas of southern Bexar County that were previously represented by Farias under the benchmark. Docket no. 1249-2 at 23 (citing TrJ1559 (Interiano)). Defendants assert that ultimately HD117 was agreed to by Rep. Villarreal and 9 of 10 members of the Bexar County delegation, that even if Garza had an improper motive, there is no evidence other members of the delegation were aware of that motive, and that Plaintiffs have not shown that Garza's individual motivations were a substantial or motivating factor

---

[20] As noted in the fact findings, this is inconsistent with Garza's own testimony that other delegation members wanted some of the stronger areas within the City that had been in his benchmark district, and that he wanted to maintain some of this territory. TrJ372, TrJ378 (Garza). Further, Garza's proposed "ideal district" included some portions of the City.

behind the Legislature's adoption of the plan. Docket no. 1249-2 at 23-24; docket no. 1272 at 54.

It is undisputed that Garza's initial ideal district was rejected by redistricting leadership because it fell below 50% SSVR and that mapdrawers and redistricting leadership felt that HD117 had to be maintained above 50% SSVR to avoid retrogression. Defendants' argument that this was an agreed delegation map is demonstrably false with regard to the configuration of HD117. Rather, the evidence is clear that Garza's and Larson's staff worked with Interiano to draw the configuration of HD117 that was placed into Plan H283, and that Farias vigorously objected to the configuration of his district. The delegation members (except Garza and Straus) also voted against the motion to table Farias's proposed amendment. D-190 at 2294-95.

Interiano worked to draw a district with exactly 50.1% SSVR to maintain its appearance as a Latino opportunity district and avoid retrogression under the mapdrawers' majority-SSVR criterion, while minimizing Hispanic turnout. He added in areas such as Somerset and Whispering Winds with higher Hispanic population but low Hispanic voter turnout and removed areas inside San Antonio, such as areas of South San Antonio ISD, that had highly mobilized Hispanic voters. Hispanic population was manipulated to maintain exactly 50.1% SSVR while minimizing Hispanic turnout and electoral performance.

Although Interiano testified that they were simply trying to balance increasing SSVR with "keeping political numbers up," his explanations for the district were not credible, as discussed in the fact findings. His testimony that Garza wanted to stay outside the City was not credible, as noted. His testimony that Garza was

concerned with water issues also was not credible, given that Garza himself testified that the political issues surrounding Bexar Met were independent from redistricting, and he did not have any goals in redistricting relating to taking more or less of Bexar Met territory. TrJ405-08. Interiano's denial of using turnout to shape the district is not credible.

Rather, the Court finds that Interiano drew the district to increase SSVR while intentionally minimizing any gains in Latino electoral performance. This is consistent with Garza's own testimony. Garza testified at his deposition that his ideal district went farther north because the area was "more Anglo and more conservative," and he preferred more Anglo and more conservative areas because "[t]hey would tend to vote Republican." PL-454 (Garza 10-19-11 depo.) at 30-31; TrJ367-69 (Garza). He also testified that he and his staff had looked at turnout, including the turnout between Anglos and Hispanics. TrJ373. He testified that rural Hispanic turnout tended to be low, and he thought Somerset Hispanic turnout would be low. TrJ374, TrJ403-04. Further, Interiano and Garza's staff knew that Garza did not tend to win SSVR-majority precincts. PL-1664. The wishes of senior member Farias to maintain his relationship with Whispering Winds and Somerset were ignored and were not permitted to interfere with the goal of protecting Garza by suppressing Latino electoral performance. And Solomons' objection to Farias's proposed amendment, which would have kept the district at 50.1% SSVR—that it contained more split precincts—was obviously pretextual given the number of split precincts in the plan created by his own mapdrawers.

The final configuration of HD117 includes a very large gap between HCVAP and SSVR of 13.7 points, well beyond any gap in any other House district.[21] By minimizing Hispanic voter registration and turnout, Interiano successfully decreased the performance of HD117. According to Handley, HD117's performance on the exogenous election index went from 60% to 20%. Considering all the evidence, that Court finds that mapdrawers intentionally drew HD117 with 50.1% SSVR but with lower performance for Latinos by manipulating Latino population and turnout. Interiano was given authority to draw the maps by redistricting leadership, and his knowledge and motives must be imputed to the Legislature as a whole, regardless of whether individual members of the Legislature were aware of the information when they voted for the map. The configuration of HD117 is evidence of intentional vote dilution under § 2 of the VRA and the Fourteenth Amendment.

In sum, any § 2 results claims in Bexar County are moot, but the Court finds that mapdrawers intentionally diluted the Latino vote in HD117 in violation of § 2 and the Fourteenth Amendment.

C. Nueces County

It is undisputed that Nueces County had two benchmark Latino opportunity districts, though they both

---

[21] Although Garza indicated that he would be happy with the higher HCVAP because those Hispanics could be registered to vote, he admitted that he and his staff did not take any actions to increase registration, TrJ432, and this testimony is also undermined by the fact that Garza and redistricters refused to allow HD117 to exceed 50.1% SSVR.

elected Republicans in 2010. It also contained part of a third district represented by Anglo Republican Todd Hunter. When faced with slower population growth in Nueces County such that it would only be entitled to two districts under the County Line Rule, Hanna advised mapdrawers that they had three options: (1) draw one "performing" Hispanic district and one not; (2) draw two equally Hispanic districts, which may not perform reliably; or (3) see if both Latino opportunity districts could be preserved by splitting county lines. D-122. Hanna advised that the County Line Rule would have to yield to the VRA if retrogression could be avoided by splitting the county and it would clearly contribute to total Hispanic voting strength statewide. As noted in the fact findings, mapdrawers chose the first option because they felt it allowed them to maintain more Republican seats and protect Republican Anglo incumbent Hunter. Mapdrawers did not look into whether two Hispanic districts could be maintained in Nueces County, either wholly within Nueces County or by breaking the County Line Rule.[22]

---

[22] Mapdrawers and Hanna were concerned with whether districts were "performing" for § 5 purposes and used SSVR and election analysis (the OAG 10) to determine whether a district was "performing." In deciding to create one "performing district" and one Anglo-Republican district favoring the incumbent Hunter, redistricters felt they could eliminate HD33 for § 5 retrogression purposes so long as they "offset" the loss somewhere else in the State.

There is no indication that they seriously looked at whether § 2 might require two opportunity districts in Nueces County. Nueces County presents a strong case for requiring the State to follow § 2 of the VRA over the County Line Rule because the Legislature used the County Line Rule as a basis for destroying an existing Latino opportunity district (as opposed to simply refusing to draw a new

Defendants contend that the reduction in population combined with the County Line Rule eliminated the minority district in Nueces County, and the delegation proposed the new districts. They contend that the configuration reflects only partisan and neutral districting principles and does not violate the VRA. The configuration of Nueces County remains unchanged in the current plan.

---

one). HD33 was 60.4% HCVAP using 2005-2009 ACS data available to the Legislature and was completely within Corpus Christi, but was underpopulated by almost 19,000 persons. HD34 was 58.2% HCVAP using 2005-2009 ACS data and was 24,000 underpopulated. Instead of trying to maintain HD33 in addition to HD34, HD33 was eliminated. As noted, redistricters believed they could offset the elimination of HD33 for § 5 purposes by increasing the SSVR of HD90 and HD148, both of which were already Latino ability districts. As noted by the D.C. Court in the § 5 preclearance litigation, "section 5 allows a state to dismantle an ability district as long as it offsets that loss by drawing a new ability district elsewhere." *Texas v. United States*, 887 F. Supp. 2d 133, 144 (D.D.C. 2012). However, as will be discussed, this use of race was improper because HD90 and HD148 were already ability districts, and thus Texas did not draw any "new" ability districts. In addition, § 2 of the VRA does not permit offsets. As discussed in the congressional plan opinion, a state may "use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." Docket no. 1339 at 47 (citing *LULAC v. Perry*, 548 U.S. 399, 429 (2006). "Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.* (quoting *LULAC*, 548 U.S. at 430). Because voters in HD90 and HD148 were already successfully electing their candidates of choice, those were existing ability districts for § 5 purposes (as found by the D.C. Court) and those voters did not have a § 2 right to be placed into a majority-HCVAP or SSVR district that could "offset" the failure to create or maintain opportunity districts elsewhere in the State if required by § 2.

The § 2 results claim in Nueces County presents two questions: (1) assuming only two districts are required within Nueces County, did plaintiffs prove a § 2 violation by the Legislature's failure to draw both as Latino opportunity districts? and (2) have Plaintiffs proven that the VRA requires more than two districts to be drawn in Nueces County (*i.e.*, a County Line rule violation)?

Defendants argue that Plaintiffs fail to prove a § 2 violation because Nueces County was only entitled to two districts and, "[a]ccording to the only population data available at the time the Texas House map was drawn, Nueces County's total SSVR percentage was 49.5%" such that creating two SSVR-majority districts within Nueces County was impossible. Docket no. 411 at 42-43. It is true that, at the time the first drafts of the map were created, the only current data mapdrawers had available was SSVR. Because Nueces County was less than 50% SSVR, it was mathematically impossible to draw two SSVR-majority districts within the County. However, mapdrawers knew that SSVR was typically lower than HCVAP, that Nueces County had been over 50% HCVAP in 2000, and that Hispanic population had increased while Anglo population had declined, meaning they had every reason to believe that the HCVAP of Nueces County was over 50% even without more recent HCVAP data.

Moreover, Defendants' assertion that HCVAP data was not available is simply untrue. The HCVAP data was available to mapdrawers by April 21, 2011, before the map went to the floor, and would have shown that Nueces County HCVAP was over 50%. Interiano stated at trial that he knew that the HCVAP of Nueces County exceeded 50%, Tr1463, and he also would have been aware that HCVAP was the appropriate measure for

determining whether § 2 required a Latino opportunity district. *E.g.*, US-76 (Opiela November 20, 2010 email, with Interiano copied, discussing that they needed to evaluate districts in terms of VAP and CVAP and stating that Fifth Circuit law clearly established CVAP as the standard). Downton testified repeatedly that he used a 50% HCVAP standard for measuring Latino opportunity districts. Nevertheless, Interiano as primary mapdrawer and other redistricting leaders continued to focus solely on SSVR for Latino districts in the Texas House plan, and never explored whether two HCVAP-majority districts could have been drawn wholly within Nueces County. TrA64-65 (Interiano).

In their briefing, the Task Force Plaintiffs assert that because Nueces County was over 50% HCVAP, two HCVAP-majority Latino opportunity districts could have been drawn wholly within the County.[23] However, while it is certainly theoretically and mathematically possible to draw two HCVAP-majority districts wholly within Nueces County, no plaintiff has provided such a proposed map or shown that the Latino populations in such districts would be compact, taking into account traditional redistricting principles. Thus, Plaintiffs fail to satisfy their burden under *Gingles* of showing that two Latino opportunity districts could be drawn wholly within Nueces County (*i.e.*, without violating the County Line Rule).

Plaintiffs have proffered demonstration maps that would maintain two Latino-majority districts in Nueces

---

[23] "The citizen voting age population of Nueces County is 54.6% Hispanic, thus allowing for two districts wholly contained within the county to be majority HCVAP." Docket no. 1282 at 51 (citing docket no. 1274 FF742); docket no. 1296 at 32.

County by breaking the County Line Rule. Because Solomons decided never to break the County Line Rule to comply with the VRA, mapdrawers did not explore whether to include more than two districts in Nueces County or whether doing so would have been required by § 2 or § 5 of the VRA, despite Hanna's advice to investigate this issue. This Court has found, and Defendants do not dispute, that both Nueces County-based benchmark districts HD33 and HD34 were majority-Hispanic, majority-HCVAP, and majority-SSVR Latino opportunity districts, even though they did not elect the Latino candidates of choice in 2010. Although Defendants have argued that this was an agreed-upon delegation map, *see e.g.*, docket no. 1249-1 at 30, the evidence is clear that mapdrawers and redistricting leadership made the decision to eliminate HD33 and to create only one Latino opportunity district within Nueces County.

Plaintiffs' demonstration maps would purportedly maintain two Latino opportunity districts, but they subordinate the County Line Rule in order to do so. Defendants' objections to the maps include the violation of the County Line Rule and racial gerrymandering. The Court finds that consideration of this issue is premature—the Court cannot hold that the Legislature was required to break the County Line Rule to maintain two Latino opportunity districts in Nueces County without Plaintiffs first showing that it was reasonably necessary to comply with § 2 (*i.e.*, that two Latino opportunity districts could not be maintained consistent with the County Line Rule). Because, as explained above, Plaintiffs have failed to make that showing, this issue is not ripe for

consideration.[24] Thus, with regard to Nueces County, Plaintiffs have failed to demonstrate a violation of § 2's results test at this time. However, they may continue to pursue this claim with regard to Plan H358 in the 2013 plan trial because the Nueces County configuration remains unchanged from Plan H283.

In addition to the § 2 results claims based on the failure to maintain two Latino opportunity districts in Nueces County, Plaintiffs contend that the decision to eliminate an existing Latino opportunity district in Nueces County was intentional vote dilution. Plaintiffs also argue that the district lines for those districts that remained in Nueces County are evidence of racial gerrymandering and intentional vote dilution. *See, e.g.*, docket no. 1279 at 49-50. The United States notes that Plan H283 includes "a convoluted line that ensures Anglo control over HD32," that HD34 "was packed with a greater share of Spanish surnamed registered voters than any Nueces County district prior to the 2011 redistricting, leaving HD32 with a substantial majority of the Anglo voters in Nueces County," and HD34 was overpopulated compared to HD32. Docket no. 1279 at 50-51. The United States also contends that the "protuberance from HD34 . . . ensured that no potential Hispanic candidate with

---

[24] In the interim plan Order, this Court also focused on SSVR and the fact that Plaintiffs had not presented a map creating two Latino districts without a county line cut, finding that "the only way to maintain two Latino districts in Nueces County is to cut a county line." Docket no. 690 at 8. The interim plan order was based only on preliminary findings and analysis, and Plaintiffs at that time had not argued that two HCVAP-majority districts could be drawn wholly within Nueces County. Further, the interim plan order did not rule out a conclusion that the VRA could require a county line cut. *Id.*

recent legislative experience—including the Republican incumbent of HD33, the former representative of HD33, and the former representative of HD34—would reside in the new HD32 to challenge the Anglo incumbent," and the State's witnesses provided no plausible alternative explanation for the convoluted boundary. Docket no. 1279 at 51. The Task Force also contends that the bizarre extensions along the border of HD32 and HD34 are evidence of racial gerrymandering. Docket no. 1282 at 64.

The Court agrees that the facts and evidence concerning the decision to eliminate HD33 in Nueces County demonstrate intentional vote dilution. Specifically, the Court relies on (1) the fact that redistricting leadership eliminated an existing Latino opportunity district without considering whether two Latino opportunity districts were required by § 2 of the VRA under the appropriate standard (HCVAP), (2) the fact that they decided to eliminate ability district HD33 without replacing it elsewhere but instead raised the SSVR of two existing ability districts to claim an "offset" under § 5 of the VRA and attempt to ward off § 2 challenges in bad faith,[25] and (3) the ultimate configuration of the remaining Nueces County districts as demonstrating racial gerrymandering.

---

[25] As noted, there is no "offset" under § 2 of the VRA, but a traditional § 2 results claim requires a plaintiff to show that more HCVAP-majority districts could have been drawn, and thus redistricters attempted in bad faith to try to preclude such a showing by artificially increasing the number of HCVAP-majority districts in the plan (*e.g.*, they used the creation of HCVAP-majority HD148 to argue that no additional Latino opportunity districts were required in Harris County).

Mapdrawers intentionally did not consider whether § 2 required two districts in Nueces County, and used a false reliance on SSVR and the County Line Rule to justify their refusal to maintain two Latino opportunity districts in Nueces County. Further, they knew that HCVAP was the proper measure for a Latino opportunity district and had HCVAP data available before the map went to the floor, but insisted on using SSVR as the measure because SSVR was lower (and lower than 50%), and it allowed them to argue that mathematically, two SSVR-majority districts could not be drawn. Although Nueces County was majority HCVAP and had been since at least 2000, they refused to consider whether two HCVAP-majority districts could be drawn wholly within the County. In addition, mapdrawers and redistricting leadership steadfastly refused to consider whether the County Line Rule might have to yield to maintain two Latino opportunity districts in the area, despite Hanna's advice to the contrary. The Court finds that their refusal to consider the proper requirements of § 2 and to attempt to comply with it was in bad faith and intended to limit Latino opportunity.

Rather than attempting to comply with § 2 by maintaining two Latino opportunity districts, mapdrawers and redistricting leadership attempted to use § 5 as a shield for their failure to attempt compliance with § 2 and for eliminating an existing Latino opportunity district. Mapdrawers and redistricting leadership asserted that, under § 5, they could "offset" the loss of HD33 as an ability district by creating a new 50% SSVR district elsewhere in the State. Mapdrawers chose two districts that were already performing reliably for Latino voters despite being under 50% SSVR (HD90 and

HD148) and raised their SSVR over 50%, claiming that these "new" Latino districts could offset the loss of HD33 and avoid statewide retrogression for preclearance purposes. However, as the D.C. Court found (and as redistricters knew), these were already ability districts, and thus increasing their SSVR did not create any "new" ability district to offset the loss of HD33. Mapdrawers and redistricting leadership relied in bad faith on a 50% SSVR standard as the definition of "ability district" despite clear DOJ guidance to the contrary so that they could claim compliance with § 5 while simultaneously ensuring that no new Latino districts were created to offset the loss of HD33.

At the same time, increasing the SSVR in HD90 and HD148 increased the number of HCVAP-majority districts in the plan by at least one (HD148) and arguably two (using 2005-2009 ACS data, the HCVAP was of HD90 was 49.7 +/- 2%). Because § 2 results claims require plaintiffs to show that more HCVAP-majority districts could have been drawn, mapdrawers acted in bad faith to try to thwart such claims by artificially inflating the number of HCVAP-majority districts—creating them where there was no § 2 right because the districts were already performing for Latinos.

Redistricting leadership ignored warnings from Nina Perales in her April 27 letter that the HD33 loss was not offset by artificially increasing the SSVR in HD90 and HD148 and that additional Latino opportunity districts were required. They chose to increase the SSVR in districts *that were already performing for Latinos* so that they could claim VRA compliance and minimize the number of Latino opportunity districts without losing or jeopardizing any Republican incumbent seats—that is

why they did not raise the SSVR in El Paso County's HD78, which elected a Republican in 2010. Mapdrawers' use of race to increase the SSVR in HD90 and HD148 in the name of VRA compliance turned the VRA on its head—instead of using race to provide equal electoral opportunity, they intentionally used it to *undermine* Latino voting opportunity.

Further, there is evidence that the mapdrawers (including specifically Rep. Hunter) racially gerrymandered the districts that remained in Nueces County to further undermine Latino voting strength. There are ten precinct splits along the HD32/HD34 border, *see* US-387, indicating that mapdrawers were likely using race to assign population since accurate political data is not available below the precinct level. Although mapdrawers claimed that they needed to make HD32 "performing," there is no evidence that they needed to put as many Hispanic voters in HD32 as they did, either to comply with § 2 or § 5. Thus, mapdrawers intentionally packed Hispanic voters into HD32 to minimize their number and influence in HD34 and protect Hunter. As discussed in the fact findings, there is also evidence that they targeted low turnout minority areas for inclusion in HD34 and intentionally drew out potential Hispanic rivals (both Republican and Democrat), again to protect the Anglo incumbent. And, as discussed below, there is evidence that Hunter intentionally overpopulated HD32 (and underpopulated his own HD34), without a legitimate justification for doing so.

In sum, Plaintiffs' § 2 results claims are not moot, but Plaintiffs failed to prove them with regard to Plan H283. Because this configuration remains unchanged in the current plan, Plaintiffs may bring their results claims with

regard to the 2013 plan. However, the Court finds that redistricters intentionally diluted Latino voting strength by eliminating HD33 in Nueces County. Mapdrawers' use of race in HD90 and HD148 to "offset" this loss was not to comply with the VRA but to intentionally dilute Latino voting strength by (1) allowing redistricting leadership to claim that they were complying with the VRAdespite eliminating HD33 and creating no new opportunity or ability districts; (2) thwarting arguments that § 2 might require additional opportunity districts by artificially inflating the number of Latino-majority districts in the plan; and (3) racially gerrymandering and utilizing population deviations to further dilute the Latino vote in the remaining two Nueces County districts. As discussed in the congressional plan opinion, there is legally significant racially polarized voting in Nueces County. Given the existence of racially polarized voting and the history of discrimination and its legacy in Nueces County, and considering the totality of circumstances, the elimination of an existing Latino opportunity district and ensuing racial gerrymandering in Nueces County is intentional vote dilution in violation of § 2 of the VRA and the Fourteenth Amendment.

D. HD35

HD35 was and remains a district composed of whole counties, though the county configuration was altered in Plan H283 and all Hispanic population metrics were decreased from the benchmark configuration. The United States contends that HD35 was a Latino opportunity district in Plan H100 and is no longer in Plan H283, and this is the result of intentional vote dilution. Docket no. 1279 at 44-45.

The Court agrees that benchmark HD35 was a Latino opportunity district, though it elected a Hispanic Republican in 2010, who was not the Hispanic candidate of choice. As drawn pursuant to a court remedy in 2001, it had 51.5% SSVR. Over the decade, it elected the Hispanic-preferred candidate four out of five times, for an endogenous election index score of 80%. Its exogenous election index score was 40%. By the time of redistricting, the SSVR of the district had risen to 55.4%, yet Plan H283 reduced it to 52.7% through its new configuration of whole counties. Its exogenous election score dropped to 20%. Because of the SSVR reduction, Hanna advised mapdrawers to perform election analysis to measure its performance, and Interiano and mapdrawers knew from the OAG election analysis that the performance for the Hispanic candidate of choice decreased. Dr. Arrington testified that benchmark HD35 was an effective Latino opportunity district, but that it was no longer effective in Plan H283. TrJ119, TrJ134-35.[26]

During the session, MALDEF offered Plan H115 that increased the SSVR of HD35 to 58.2%, but it broke the County Line Rule. In addition, Rep. King (an Anglo Democrat) proposed an amendment (Plan H161) that would have changed the county configuration, but the

---

[26] Dr. Engstrom, the Task Force's expert, found that enacted HD35 did not provide a reasonable opportunity for Latinos because they did not win a majority of votes cast in 7 general and 6 Democrat primary elections with Latino candidates more often than not. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 28. However, the Task Force also takes the position that benchmark HD35 was not a Latino opportunity district. Defendants' expert Dr. Alford found that Democrats went from 28/48 (58%) wins to 23/48 (48%) wins in HD35. US-350 at 7 & Table 2.

incumbent Aliseda objected. He stated that the amendment increased his SSVR "a little bit more" (he stated it was less than .02%), but asserted that was not the reason he objected; rather, he asserted, it was because it made his district "into a more democrat district." D-13 at S183-84. Rep. Coleman offered Plan H232, which he stated "strengthened existing Latino opportunity district HD35" and made it more likely to perform. Martin opined that Plan H232 strengthened HD35 while preserving other Latino districts in the region and complying with the County Line Rule. Joint Expert Ex. E-5 (Martin Report) at 13-14.

According to the D.C. Court's opinion in the § 5 preclearance litigation, the parties agreed that HD35 in Plan H283 was not an ability district, but they disagreed on whether it was an ability district in the benchmark and thus whether there was retrogression. *Texas v. United States*, 887 F. Supp. 2d 133, 167 (D.D.C. 2012) (vacated on other grounds). The D.C. Court found that it had been an ability district because it had a high endogenous success rate (80%) despite lower exogenous index scores. The D.C. Court concluded that it no longer was an ability district in Plan H283 based on the "low exogenous election results for the enacted district combined with HCVAP changes that push the district even closer to the majority line." *Id.* at 168. It noted that this particular district presented "a close and very difficult case" and that it might have reached a different conclusion if presented "with more or different evidence," but that the State had not met its burden of proof. *Id.* at 168 n.37.

This Court finds that HD35 remains an opportunity district in Plan H283. The evidence shows that benchmark HD35 performed well for Latinos despite weak exogenous

election scores. Some changes to the district were required by the fact that it was underpopulated by 9.4%. Although Handley's index and the OAG 10 showed a one election decrease in Latino performance on the exogenous index between the benchmark and enacted districts, Dr. Engstrom's analysis actually showed an *increase* in Latino performance from 2-5 to 3-4. Plaintiffs have failed to meet their burden of proof of demonstrating that HD35 is no longer an opportunity district. In addition, as discussed in the fact findings, there is no evidence to support the United States' contention that mapdrawers manipulated turnout in this district. Accordingly, the Court finds that this district does not support a claim of intentional vote dilution or racial gerrymandering.

E. HD41

Several Plaintiffs, including MALC, Perez Plaintiffs,[27] and the United States, challenge HD41 as the product of racial discrimination and intentional vote dilution. Defendants contend it is merely the product of partisan gerrymandering to protect newly-Republican Aaron Peña.

The United States argues that HD41 was changed so significantly and contains so many split precincts that its continued status as an opportunity district is in question.

---

[27] Perez Plaintiffs' proposed conclusions of law (docket no. 1265) assert intentional vote dilution with regard to HD41, but the district is not mentioned in their 2014 Post-Trial Brief (docket no. 1263). Their 2011 Post-Trial Brief argues that the population deviations in the district violate the Equal Protection Clause and that the Valley configuration is less consistent with the County Line Rule as construed by *Clements v. Valles* than MALC's and other Plaintiffs' proposals creating a Cameron+Hidalgo County district. Docket no. 401 at 14-15.

Although its HCVAP and SSVR percentages decreased by around 5%, they remained high at 72.1% HCVAP and 63% total SSVR. The D.C. Court concluded that HD41 remained a Hispanic ability district in Plan H283 because the court applied a 65% HCVAP ability presumption that was not disproved. Texas, 887 F. Supp. 2d at 169-70. Further, Hidalgo County was over 85% HCVAP. Dr. Engstrom concluded that HD41 in Plan H283 remained a Latino opportunity district. The Court finds that HD41 remains an opportunity district in Plan H283.

Nevertheless, the Court finds that HD41 was drawn in part with racially discriminatory (dilutive) motive. The United States argues that the precinct splits in the district cannot be explained by partisan motivation and were racially discriminatory. Docket no. 1279 at 45. Dr. Arrington looked at all splits in HD41 and found that they made the district more Anglo. However, the most relevant splits are those made after Plan H113[28] that actually involved some population. As discussed in the fact findings, some of Downton's precincts splits after Plan H113 were consistent with Anglo maximization to increase the Anglo VAP of the district, and they were not consistent with Republican maximization. Although mapdrawers (including Peña) testified that the changes were made to "maximize" the district for Republican performance, election analysis results showed that the changes resulted in a decline in Republican performance, with corresponding increases in Democratic performance. *See* US-517 (Red-225 Report for Plan H113); D-109 (Plan H283 reports). Thus, the explanation that the numerous

---

[28] Peña's district had four precinct splits in Plan H113, but they were adequately explained by non-racial reasons.

precinct splits were made to "maximize" the district for Republican performance is not credible. Nor was other testimony offered by mapdrawers that the numerous precinct splits were made simply "to follow roads."

As noted in the fact findings, the district HVAP and HCVAP population did not change despite the substantial manipulation and precinct changes that occurred on April 17. However, although the *net* effect of all the changes made between Plan H113 and Plan H283 was not to make the district more Anglo and less Hispanic, that does not negate the fact that some particular precinct splits were made with a racially discriminatory motive. In Plan H113, Peña's district was significantly (4.92%) below ideal population, while the neighboring districts were all overpopulated. Downton recognized this as a potential problem and worked with Peña to increase the population of the district while "maximizing" it for Peña's benefit.[29] However, because the area is heavily Hispanic and the original configuration of the district already contained the most Republican areas, Downton had to work to increase the population of the district while simultaneously maintaining the Anglo and Hispanic populations in an attempt to protect Peña.

Downton increased the population of the district by 857 persons (he admitted to not increasing the population any more because it would make the district less favorable to Peña), but kept its racial population metrics basically the same, in part by using precinct splits in a racially discriminatory manner. Had he not utilized the precinct

---

[29] As discussed in the section on the one person, one vote claims, HD41 was nevertheless left intentionally underpopulated because adding more persons would have meant adding more Hispanics.

splits in such a manner, the effect of increasing the population would have been an increase in Hispanic population in the district, making it more likely to perform for Hispanic voters (and redistricters presumed, less likely to re-elect Peña). Thus, although all of the precinct splits together did not negatively impact the Hispanic population of the district, the racially discriminatory precinct splits were used to offset the racially favorable splits.

In addition to manipulating total population, the SSVR of HD41 is significantly lower (63%/64.6%) than the other Hidalgo County districts, which are 85.8%/86.4% (HD40), 82.2%/83.1% (HD39), 85.1%/85.8% (HD36), and 90.8%/91.3% (HD31), and is lower than any of those benchmark district's SSVR levels, again demonstrating an intent to draw the district with fewer Hispanic voters. The SSVR of Peña's district was reduced, while the SSVR of three of the other districts was increased, and at the same time mapdrawers knew that the performance of HD41 for Latino voters decreased from 7/10 to 5/10 on the OAG 10. Although Solomons repeatedly touted the map as "member driven," the Hidalgo County configuration was not drawn with input from the other members of the Valley delegation and disregarded member-constituent relations in order to gerrymander the district, both politically and racially.

The Court thus finds that mapdrawers intentionally used race to draw the district to perform less favorably for Latinos. They also intentionally manipulated the SSVR and total population to dilute the Latino vote in HD41 in order to protect an incumbent who they believed would no longer be the Latino candidate of choice given his decision to switch parties. Given the existence of

racially polarized voting in the Valley (as found by Dr. Engstrom), the lingering effects of past discrimination in terms of socio-economic factors, and the totality of circumstances, the configuration of HD41 is racially discriminatory and constitutes intentional vote dilution in violation of § 2 and the Fourteenth Amendment. Although the individual members of the Legislature may not have been aware of this when they voted to pass Plan H283, Downton was given the authority to make these changes to the map and his intent must be imputed to the Legislature as a whole.

F. Cameron+Hidalgo/Rio Grande Valley configuration

The benchmark plan contained six Latino opportunity districts wholly within Hidalgo and Cameron Counties—four wholly within Hidalgo County and two wholly within Cameron County. The excess population in Cameron County was joined with counties to the north in HD43, also a Latino opportunity district. Plan H283 also creates six HCVAP-majority districts[30] wholly within Cameron and Hidalgo Counties (four within Hidalgo County and two within Cameron County); the surplus of Cameron County is joined into HD43 to the north, and the surplus of Hidalgo County is joined into HD31 to the west; both HD31 and HD43 are Latino opportunity districts.

The Task Force and MALC assert that § 2 required the State to create an additional district in the Rio Grande Valley by combining the surplus population of Cameron

---

[30] As discussed, the continued status of HD35 and HD41 as Latino opportunity districts is challenged by the United States. The Task Force regards HD41 in Plan H283 as a Latino opportunity district. Docket no. 1282 at 6 n.4. The Court has found that HD41 remains a Latino opportunity district in Plan H283.

and Hidalgo Counties, creating seven Valley-based districts, and that this would actually be more consistent with the County Line Rule than the State's configuration. This was done in the Court's interim map (Plan H309) such that seven districts are wholly contained within Hidalgo and Cameron Counties, with no spillover. This is also done in MALC's Plan H201 through the creation of HD144 and MALC's Plan H295 through the creation of HD35. Additional proposed plans create a seventh Valley district but also include spillover in another district, including Task Force Plan H292 (HD32) and MALC Plan H205 (HD72).[31]

In their 2011 briefing, Defendants contended that the "undisputed evidence at trial showed . . . that creating a new district in Hidalgo and Cameron would have required the Legislature to violate the county-line rule in other parts of the State." Docket no. 411 at 44; docket no. 457 at 29-30; *see also* TrA78 (Interiano) ("I tried to do it, and I told David Hanna that I had not found a way to put the population together without causing a county line split further up the road."). This assertion has since been disproved, as shown in the Court's interim plan H309. However, it is true that all maps presented to the mapdrawers during the session that created this district also had a county line break around Nueces County.

Downton testified that it was permissible to create the Cameron+Hidalgo County district, but it was not legally

---

[31] Both of these plans include 25 districts within Harris County, which affects districts outside of drop-in counties. Further, as noted, the NAACP also included such a district (HD72) in their demonstration Plan H202, but did not brief it as a required § 2 district. The Hidalgo County configuration of Plan H202 is identical to that of MALC's H205, but Cameron County differs.

required, and redistricters made a policy decision not to create it. TrJ2094-95. Defendants argue that no voter in that area suffered a § 2 injury from the State's chosen configuration because all Cameron and Hidalgo County voters are in Latino opportunity districts under either configuration. Docket no. 1272 at 102.[32] The Court agrees that *if* the Legislature created the required number of § 2 districts and substantially addressed the § 2 violation, they had discretion in determining the configuration of the districts. However, Plaintiffs are arguing that creation of the Cameron+Hidalgo district was more consistent with the County Line Rule, recognized the Latino growth in the Valley, and allowed for the creation of an *additional* Latino opportunity district over the number created in Plan H283, which could establish a § 2 violation.

Thus, for Plaintiffs to succeed on their § 2 results claim, they must demonstrate that creating this additional Hidalgo+Cameron district creates *more* Latino opportunity districts in South Texas (or statewide) than does Plan H283. Although Plan H201 creates an additional Valley Latino opportunity district over Plan H283 by adding HD144 and retaining HD33 by utilizing a county line split, HD35 is no longer a Latino opportunity

---

[32] The Task Force responds that Defendants miss "the critical difference between the voters of Cameron and Hidalgo Counties living in *six* Latino opportunity districts versus living in *seven* Latino opportunity districts." Docket no. 1296 at 36 (emphasis in original). To the extent the Task Force is thus arguing that § 2 required the State to draw seven districts wholly within Cameron and Hidalgo Counties instead of six wholly within and two partially within simply so that the voters of Hidalgo and Cameron Counties could have seven districts to themselves, the Task Force fails to support this assertion legally.

district, whereas it is in Plan H283. Plan H283 has 13 South and West Texas Latino opportunity districts (not including El Paso but including Nueces County). Plan H201 has 14, but only because it maintains HD33 in Nueces County district. Thus, it is really the retention of HD33 as a Latino opportunity district that results in an additional HCVAP-majority district over the enacted plan. This issue therefore boils down to the Nueces County issue, and the Court will not consider proposed maps that split Nueces County to create an additional district until it is shown that two Latino opportunity districts cannot be drawn wholly within Nueces County.[33]

The Task Force contends that Plan H292 adds HD33 in Nueces County and HD35 in the Valley compared to Plan H283. But it does not count HD35 in Plan H283 as an opportunity district. Counting HD35 in Plan H283 as a Latino opportunity district, the only additional district created is in Nueces County.[34] Again that simply boils

---

[33] Similarly, eleven-district "plug in" plan H294 does not create an additional HCVAP-majority district; it just reconfigures the districts.

[34] The Task Force uses a combination of demographics and Dr. Engstrom's 13-election analysis to classify a district as a Latino opportunity district or not. Using the Task Force's classifications, Plan H283 has 12 districts in South/West Texas (excluding El Paso) and Plan H292 has 14. Plan H283 includes: 31, 34, 36, 37, 38, 39, 40, 41, 42, 43, 74, & 80, while Plan H292 has 14, including those same districts plus 32, 33, 35, but not 80, for an increase of two districts. However, this Court does not agree with the Task Force's classification of all opportunity districts, and for the reasons explained in the Congressional map opinion, has rejected a 50% success test for determining opportunity. The Court has concluded that HD35 in Plan H283 is a Latino opportunity district, and as such the increase in Plan H292 is only one district—HD33 in Nueces County. It may be that HD80 (with a HCVAP of 55.9%) in Plan H292

down to a Nueces County issue. Plan H292 also has 25 districts in Harris County, which has ripple effects in all the non-drop-in county districts statewide because there is one less district outside the drop-in counties.

MALC Plan H295 creates seven districts wholly within Hidalgo and Cameron Counties by moving HD35 to the Valley. Again, however, it does not appear to create more Latino opportunity districts other than the Nueces County district.

Plan H205 purports to create an additional district over Plan H283. It also splits Nueces County to create a Latino opportunity district, and it includes 25 districts in Harris County. Further, Plan H205 substantially disregards the County Line Rule—Defendants argue that it violates the County Line Rule at least 25 times. Docket no. 457 at 29-30; docket no. 645 at 14-15. Plaintiffs must show that these County Line Rule violations were reasonably necessary to comply with § 2 and, given the Court's conclusion below that the proposed West Texas districts are not compelled by the VRA, resulting changes to that portion of the map will also affect non drop-in county areas of the State, making an analysis of the number of Latino opportunity districts created in South Texas unreliable. Given these issues and the fact that the current plan includes the Hidalgo+Cameron district but not HD35, the Court finds that this results claim is best resolved with regard to the 2013 plan in effect.

However, certain Plaintiffs (including the United States and the Task Force Plaintiffs), argue that the

---

is also a Latino opportunity district, but the Task Force has not made such a claim (in fact it claims it is not one) nor provided evidence or briefing to support it.

State's "deliberate decision not to recognize explosive Hispanic growth in the Rio Grande Valley through the creation of an additional Hispanic opportunity district constitutes intentional vote dilution." Docket no. 1279 at 39. The Court finds that Plaintiffs have failed to prove an intentional vote dilution claim based on the failure to draw the Cameron+Hidalgo district. As noted, mapdrawers were not presented with a plan that clearly created an additional Latino opportunity district compared to what they had drawn, and they had discretion in choosing how to configure the Hidalgo and Cameron County districts to address § 2.

G. Harris County

In addition to their one person, one vote claims based on population deviations (addressed below), Plaintiffs assert §2 results and intentional vote dilution claims in Harris County. Plaintiffs primarily complain that Defendants did not create an additional minority opportunity district in Harris County despite the minority population growth, but also contend that the Legislature's decision to reduce the number of districts in Harris County to 24 and to eliminate HD149, which Plaintiffs contend was a tri-ethnic coalition district, while protecting Anglo districts with slower population growth, were racially discriminatory actions designed to dilute the minority vote.

The Task Force Plaintiffs argue that an additional Latino opportunity district could have been drawn in Harris County. MALC offers demonstration district HD144 in Plan H205 and Plan H295 (though Plan H205

includes 25 districts in Harris County).[35] The NAACP also complains about the reduction of minority voting strength in HD144, which it argues had naturally become viable for minorities given the population growth, and argues that an additional minority coalition district could have been drawn (by maintaining both HD137 and HD149), as shown in Plan H202 (which has 24 districts in Harris County). Docket no. 625 at 5-7; docket no. 1280 at 37.

Defendants admit that "Plan H283 did not create additional majority-Latino or majority African American districts in Harris County," though they assert that the SSVR and HCVAP of HD148 were increased over 50%. Docket no. 413 FF62.[36] They argue that the reduction of districts in Harris County was not discriminatory but

---

[35] Defendants argue that Plan H205 creates the same number of Latino opportunity districts (4) in Harris County (HD140, HD143, HD144, and HD145) as Plan H283 (HD140, HD143, HD145, and HD148). Docket no. 457 at 30-31. Defendants contend that Plan H205 also "retrogresses" HD148 by reducing its SSVR from 40% to 35.7%, whereas Plan H283 "strengthens Latino make-up of this district by increasing the SSVR to 50.0%." *Id.* at 31 n.16.

[36] Defendants assert that, "at the request of MALDEF, H283 increased SSVR and HCVAP to over 50% in Harris County House District 148." Docket no. 413 FF62. Using their demographic criteria for opportunity districts, Defendants argue that Plan H283 creates nine minority opportunity districts, and that none of the proposed 25-district plans creates more than nine (they say Plan H292 creates 9), while other plans create fewer. Docket no. 411 at 45; docket no. 413 FF85-88. However, to the extent the Legislature increased the SSVR of HD148 in order to count it as an ability or opportunity district for purposes of the VRA, it created a § 2 remedy where there was no § 2 liability because it is undisputed that HD148 routinely elected the Latino candidate of choice. Thus, the Legislature's choice to artificially inflate the SSVR (and with it the HCVAP) of HD148 does not preclude Plaintiffs from arguing that a different Latino opportunity district was required in Harris County.

"resulted from basic arithmetic and the combined legal requirements of the Texas and United States Constitutions." Docket no. 457 at 69. They also assert that the Democrat members never offered a proposed map such that "Downton worked from a proposal supplied by the Republican members of the delegation" and "then accommodated Democratic changes to the extent possible." *Id.* Defendants argue that the decision to apportion 24 seats in Harris County "did not prevent the creation of an additional minority-majority district" and that "Plaintiffs have not demonstrated that the addition of another district in Harris County would have resulted in an additional minority opportunity district." Docket no. 411 at 45. Defendants also contend that neither HD137 nor HD149 was a protected minority coalition district and that the decision to eliminate them was partisan, not racial. *Id.* at 45-46.

In this Court's interim plan H309, the Court found that Plaintiffs had demonstrated a likelihood of success on the merits of the § 2 claim in eastern Harris County, specifically that Plaintiffs had presented numerous demonstration plans illustrating that an additional compact majority-HCVAP district was possible in eastern Harris County, and made a preliminary finding that creation of a new Latino opportunity district was justified by the totality of circumstances. Docket no. 690 at 8-9. The Court's interim plan thus reconfigured HD144 in the manner requested by Plaintiffs to have a majority HCVAP. *Id.* The Court also maintained both HD137 and HD149, finding that the § 5 claims were not insubstantial, and making no other claims determinations. *Id.* This configuration remains in the plan adopted by the Legislature and currently in effect (Plan H358). Given

that the current plan includes a district similar to MALC's proposed HD144 and maintains both HD137 and HD149 with only 24 districts, the results claim is moot.

However, Plaintiffs claim that the decision to reduce Harris County to 24 districts, the elimination of HD149, and the deliberate failure to draw any new opportunity districts in Harris County are evidence of intentional discrimination.[37]

MALC contends that redistricting leadership had discretion to choose either 24 or 25 districts, yet chose 24 to avoid drawing an additional Latino opportunity district in Harris County. Docket no. 459 at 17.[38] Other Plaintiffs also complain that the decision to decrease the delegation to 24 was intentionally racially discriminatory because it would eliminate a minority district. The Court finds that the mapdrawers' decision to include only 24 districts in Harris County was reasonable, given the language of the Texas Constitution and simple math, and was not intentional vote dilution. The Court notes that Hanna recommended rounding down to 24 districts initially, even when he believed this would mean the loss of a Republican seat. D-192. He noted that 24 more closely tracked the constitutional language, and that the risk of choosing incorrectly was "catastrophic" in terms of affecting all

---

[37] The Perez Plaintiffs cite Harris County as an example of intentional fragmentation (docket no. 1263 at 5), but there is no briefing on this issue in their 2014 Post-Trial Brief. Their proposed conclusions of law (docket no. 1265) refer to HD132, HD137, HD145, HD148, and HD149 as districts that evidence discrimination.

[38] MALC points to its Plan H205, which it asserts "maintains the current Latino opportunity districts, but also enhances the Latino population in district 144 so that it goes from an emerging Latino district to a true Latino opportunity district." *Id.* at 17-18; docket no. 1185 at 13 n.29.

districts outside of the drop-in counties. D-135. The Court is not convinced that past practice of rounding up indicates pretext in this case, given that different decisionmakers were involved in those decisions (different legislature and the LRB), and that Democratic and minority members had voted to round down in the prior legislative session when presented with similar numbers. The Court does not find any evidence to support the assertion that the decision to round down to 24 was racially discriminatory.

The NAACP Plaintiffs argue that Texas ran afoul of the Supreme Court's warning in *Bartlett v. Strickland* by intentionally eliminating a performing minority district (HD149)[39] in violation of the Fourteenth Amendment. Docket no. 1294 at 14. They contend that Interiano admitted dissolving HD149 despite knowing it was a district in which a diverse group of minority voters elected the candidate of their choice, Hubert Vo, because they did not think the VRA required them to maintain it. Docket no. 1280 at 37 (citing Tr1482 (Interiano)). They argue that "[t]his callous disregard for proven voting rights gains from an extant cohesive minority population is certainly evidence of an intent to discriminate . . . ." *Id.*

The Court need not decide whether HD149 was a protected coalition district because the evidence does not sufficiently support Plaintiffs' claim that it was targeted

---

[39] The NAACP argues that HD149 "was a compact, naturally-occurring multi-ethnic coalition district whose voters had a proven track record of being politically cohesive and electing their candidate of choice, Rep. Vo." Docket no. 1280 at 37. They note that HD149 could have been preserved even with a 24-district configuration, as shown in their Plan H202, and without diminishing HD137 Docket no. 1280 at 37-38 (Joint Map Ex. J-25).

for removal because it was a minority opportunity district or because its elected representative was a minority candidate of choice, rather than simply because it was electing a Democrat. Mapdrawers and redistricting leadership did not believe it to be a protected minority opportunity district and it was chosen for removal because one district was being eliminated and Republicans saw an opportunity to pair two Democrats, thereby increasing Republican seats and protecting all other incumbents.[40] The pairing of two Democrats was consistent with Solomons' decision to always pair two members of the same political party to theoretically give each incumbent a chance to be re-elected in the general election.

Plaintiffs further contend that the enacted 24-district configuration in Harris County intentionally diluted minority voting strength. The Task Force complains that no new Latino opportunity district was created and that instead Latino voters were packed into other districts to minimize their electoral influence. The Task Force Plaintiffs note that Hanna's April 12 memo advised redistricting leadership to consider whether a fifth Hispanic-majority district could be drawn and whether it would be required by § 2, yet mapdrawers ignored this

---

[40] Defendants note that the United States contended in its interrogatory responses (D-120) that redistricting leadership ignored advice from David Hanna of the TLC regarding whether the minority coalition districts in Harris County were protected. Docket no. 1249-1 at 23. However, Hanna's initial assessment of HD137 as a Latino opportunity district changed, and he later advised that it was not a protected district. D-123. Hanna never advised that HD149 was a protected district, and in fact characterized that as a "novel" theory. Id.

advice. Docket no. 1274 FF472, 483, 749; docket no. 1282 at 26, 33. Hanna testified that he was able to draw a fifth Latino district. TrJ1207. Downton claimed he did not attempt to draw one and does now know if anyone else did. TrJ2052-53.

MALC asserts that mapdrawers avoided creating a new Latino opportunity district in Harris County by artificially increasing the SSVR in HD148 (incorrectly cited as HD145) even though it was already performing for Latino voters. Docket no. 1185 at 13 n.29. MALC argues that this increase of SSVR in a "district that the State itself has characterized as a performing Latino opportunity district, to avoid the development of a real new Latino opportunity district in Harris County is not evidence of compliance with Section 2, but rather evidence of intentional discrimination." Docket no. 412 at 20.

The Perez Plaintiffs note that Anglo population in Harris County declined such that Anglos are now only 33% of the population, yet Plan H283 gives them control of 54% of seats. Docket no. 401 at 11.[41] They argue that

---

[41] They note that the plan was drawn by the Republican delegation, with Democrat and minority members marginalized, and "every Anglo member in Harris County is protected." *Id.* at 12-13 (citing Tr349 (Martin)). Defendants take issue with this statement, noting that Hochberg, an Anglo, was paired and therefore not protected. However, Plaintiffs have argued that Hochberg was favored in this pairing, and thus it was racially discriminatory. The Court concludes that Plaintiffs have failed to prove that the ultimate configuration favored Hochberg for racially discriminatory reasons.

Plaintiffs further point to various racial references made by the Republican delegation members, who drew the initial Harris County configuration. These include references in Rep. Smith's plan log (US-441) to making districts "more Hispanic" or "more Anglo" and statements made by Rep. Woolley to Rep. Coleman. The Court

"creative line drawing" and population deviations were necessary tools in this accomplishment. Docket no. 401 at 13 (citing Tr341-42 (Martin)).[42] They further note that, although Interiano testified that they increased the SSVR in HD148 at MALDEF's urging, Nina Perales sent a letter to Solomons "specifically repudiating any such request." *Id.* at 13-14.[43]

The Court finds that there is persuasive evidence of intentional vote dilution in Harris County. Harris County is yet another example of where the member-driven process was at odds with § 2 compliance. Redistricting leadership assumed that county delegations would consider VRA compliance because the delegations contained minority members, yet in Harris County the minority members were essentially shut out of the initial map-drawing process.[44] Accordingly, although Hanna had recommended considering whether an additional Latino opportunity district could be drawn (as he was able to),

---

agrees that these references are evidence that the Republican delegation members were thinking in terms of race when drawing the Harris County districts, but it does not rely on these statements to find intentional vote dilution.

[42] As discussed in the fact findings, some of the initially suspect lines in Harris County turned out to be the result of the minority Democrats' changes, not racially discriminatory gerrymandering.

[43] The Court notes that Perales did not "repudiate" MALDEF's assertion that the SSVR/HCVAP of HD148 could or should be increased above 50%. Rather, she asserted that increasing the SSVR/HCVAP of existing ability districts HD90 and HD148 could not offset the loss of HD33 because they were existing ability districts, and that additional Latino opportunity districts were still required.

[44] As detailed in the fact findings, when minority members were eventually given an opportunity to give input, they were severely restricted, and unable to affect the Republican districts without agreement.

this recommendation was ignored. Anglo Republican districts in eastern Harris County, which had grown more slowly than the more heavily minority areas, were protected, and no new minority district was considered, even though the evidence shows that a new Latino opportunity district could have been drawn that reflected the Hispanic population growth in Harris County.[45]

Faced with a map that failed to create any new Latino opportunity districts, mapdrawers then artificially inflated the SSVR and HCVAP of existing Latino ability district HD148 to claim VRA compliance. Redistricting leadership feigned VRA compliance but used it to undermine minority voting strength instead of truly complying with the Act. They claimed that newly majority-SSVR/HCVAP HD148 could offset the loss of existing ability district HD33 in Nueces County and used it to thwart claims that an additional Latino opportunity district was required by § 2 based on the number of HCVAP-majority districts in Harris County.

Yet the evidence is clear that mapdrawers already viewed HD148 as one of the performing Latino districts in Harris County. And as the Task Force Plaintiffs note, Downton agreed that raising the SSVR of HD148 to 50% did not enhance the ability of minority voters to elect their candidate of choice. Docket no. 1282 at 60; docket no. 1274 FF822; TrJ2050 (Downton). Thus, mapdrawers were

---

[45] In the interim map proceedings, Defendants noted that their proposed Plan H303 created an additional HCVAP-majority district (HD144) while maintaining the four existing Latino ability districts (HD140, HD143, HD145, and HD148), and that HD144 "reflects the strong growth of the Latino population in Harris County," though they refused to concede that the *Gingles* factors or the totality of circumstances required a new district. Docket no. 668 at 10-11.

using this superficial compliance as a tool to avoid creating any new minority opportunity districts (more specifically, to defend their failure to create any) and to mask the loss of HD33 as an existing opportunity district.[46]

Given the existence of racially polarized voting, the lingering effects of past discrimination, and the totality of circumstances, the Court finds that the Harris County configuration is the result of intentional vote dilution in violation of §2 and the Fourteenth Amendment.

H. Fort Bend County

The NAACP and MALC contend that an additional minority coalition district was required in Fort Bend County. The NAACP Plaintiffs argue that this was an area experiencing substantial population growth among a diverse group of voters, mostly minority. Docket no. 1280

---

[46] Plaintiffs have argued that increasing the SSVR of HD148 was packing, made it more difficult to create an additional Latino opportunity district in Harris County, and weakened minority influence in other districts. *See, e.g.*, Tr345-46 (Martin); Joint Expert Ex. E-5 (Martin Report) at 6-7; Farrar Decl. (docket no. 331-3) at 4 (noting that fewer Latinos were available to buttress emerging minority districts like HD138 and HD144). However, when the SSVR of HD148 was increased between Plan H113 and Plan H153, population was merely shifted among several minority districts, meaning that no additional minority votes were placed in a minority district and "wasted." Thus, the act of increasing the SSVR in HD148 was not itself packing. However, mapdrawers used the fact that HD148 was now over 50% SSVR and HCVAP to ward off claims under § 2 that additional Latino districts were required. And, as noted, they used it in bad faith to claim offset of the loss of HD33. In addition to intentional vote dilution, the Court notes that this racial manipulation of the district for the sole purpose of inflating the SSVR of HD148 would seem to present a clear *Shaw*-type racial gerrymandering case, but no party has asserted such a claim.

at 38 (citing TrJ1411 (Korbel)). They assert that, "[i]nstead of drawing compact districts that would recognize the naturally occurring minority district in Fort Bend—that is, the 150,000 more minority voters than Anglo added over the decade—the enacted plan drew HD 26 as an incredibly non-compact district, intended to be one that could be maintained as an Anglo district over the decade." Docket no. 1280 at 38 (citing TrJ1412-14 (Korbel) and TrJ1607 (Interiano)). MALC asserts that minority population contributed 80% of the growth for Fort Bend, Wharton, and Jackson Counties, and new HD85 was placed there to account for growth, but it is not a minority opportunity district. Docket no. 1275 FF90, 91 (citing Tr1412 (Korbel)). MALC further contends that a "heavy concentration of minority Texans in Fort Bend County is divided into 4 districts, which has the effect [of] diminishing the electoral opportunities of minorities." Docket no. 1275 FF92 (citing Tr1416-17 (Korbel)).

The NAACP offers Plan H202, with HD26 as a proposed tri-ethnic coalition district that would operate as an Asian-American opportunity district. Docket no. 406 at 33. The NAACP argues that African-American, Latino, and Asian-American voters in the larger Houston area are politically cohesive, that this district had become viable for minority voters in the benchmark,[47] and that the

---

[47] Certain parties argued in the D.C. Court preclearance litigation that HD26 had become an ability district, but the D.C. Court disagreed because "the only evidence presented" showed it was not a majority-minority district and it was currently represented by an Anglo Republican. *Texas v. United States*, 887 F. Supp. 2d 133, 175 (D.D.C. 2012). The Court noted, "At best, the evidence may show that the districts are beginning to favor minority-preferred candidates, but section 5's effect prong protects only existing, not emerging,

voters in this area are similar to those who act in a tri-ethnic coalition to elect Vo in HD149, just across the line in Harris County. Docket no. 625 at 7-8; docket no. 1280 at 38 (citing TrJ1422 (Korbel)).

Proposed HD26 in Plan H202 would be 12.9% HCVAP, 14.5% Black Alone CVAP, 23.8% Asian CVAP (for a combined minority CVAP of 51.2%), and 47.7% Anglo CVAP using 2005-2009 ACS data. Joint Ex. J-25. The NAACP tenders Fairfax's opinion that the district had become 57% minority CVAP by 2014 and that it complies with traditional redistricting criteria including compactness, contiguity, and respecting political subdivisions. Tr841-42, TrJ902. Rep. Senfronia Thompson testified about the coalition here and concluded HD26 would elect an Asian American and the candidate of choice of minority voters. TrJ1245-46. The NAACP Plaintiffs also assert that the evidence applicable to Harris County is "equally applicable to the creation of a new minority State House District in this area" because voting in the "larger Houston metro area is racially polarized, and the area has historically demonstrated high

---

ability districts." *Id.* According to the 2005-2009 ACS data available to redistricters, benchmark HD26 was 53.5% White Alone CVAP (though it was only 39.4% Anglo in terms of total population and 41.9% Anglo VAP), and 10.5% HCVAP, 12.6% Black Alone CVAP, and 22.2% Asian Alone CVAP. Thus, it remained majority-Anglo CVAP using 2005-2009 ACS data. However, using 2008-2012 ACS data, which the Court has concluded better reflects the true population in 2010, it had become majority-minority CVAP: the White Alone CVAP was 48.2%, Asian Alone CVAP was 25.9%, HCVAP was 12.7%, and Black Alone CVAP was 12.1%. In Plan H283, HD26 is again Anglo-majority CVAP: it is 57.3% White Alone CVAP, and 11.6% HCVAP, 10.6% Black Alone CVAP, and 19.6% Asian Alone CVAP using 2005-2009 ACS data.

levels of political cohesion amongst minority voters." Docket no. 406 at 33.

Visually, HD26 is relatively compact looking, and where its shape is somewhat odd it appears to follow a river. Existing HD27 also appears visually compact and is virtually the same configuration as in Plan H283. However, the districts do split the cities of Sugar Land, Missouri City, and Arcola. Further, even when a district is visually or geographically compact, Plaintiffs must still proffer evidence that the minority communities within the proposed district are compact, taking into account traditional redistricting principles. *See Gonzales v. Harris Cty., Tex.*, 601 F. App'x 255, *257 (5th Cir. Feb. 9, 2015) (affirming district court's conclusion that although plaintiffs presented a "geographically compact hypothetical district" that satisfied the numerosity requirement, plaintiffs nevertheless failed to satisfy the compactness precondition because their plans did not respect traditional districting principles). Other than compactness scores, Plaintiffs have not proffered any specific evidence concerning the compactness of the minority community in light of traditional districting principles such as respecting cities.

Further, even if the NAACP Plaintiffs satisfied the first *Gingles* precondition, they did not proffer sufficient evidence supporting the second and third *Gingles* factors. The NAACP Plaintiffs offered only lay testimony concerning minority cohesion in Fort Bend County. While lay testimony is relevant, statistical data is essential when asserting cohesion among three different minority groups. The Court will not infer cohesion in Fort Bend

County based on cohesion in nearby HD149 in Harris County.[48]

MALC offers Plan H329 that would create coalition districts HD26 and HD27. MALC-128. MALC also offers demonstration Plan H366 with "plug-in districts" for Fort Bend County. MALC introduced the expert opinion of Dr. Brischetto concerning racially polarized voting, though he only examined 2012 elections. The Court finds these plans should be addressed in the 2013 plan case, but notes that MALC must offer evidence demonstrating that the minority communities contained within these proposed districts are compact, taking into account traditional districting principles.

Several Plaintiffs point to Fort Bend County as evidence of intentional vote dilution. The Perez and NAACP Plaintiffs contend that mapdrawers racially gerrymandered by splitting the minority community among HDs 26, 28, and 85. Docket no. 1303 at 5 (citing Martin report at 12). MALC notes that there are "several" precinct splits "between HD26 and other districts in Fort Bend County" and "[a]ll of the evidence points to the fact that the State used race-based mapping splitting precincts along racial lines to lessen minority voting strength." Docket no. 1185 at 8. Plaintiffs note that Fort Bend County is only 38% Anglo, but Anglos control

---

[48] The Court has found that the Perez Plaintiffs did not bring § 2 results claims, though they did submit demonstration Plan H290 for Fort Bend County. To the extent this was offered as a *Gingles* plan, the Court finds that they did not proffer sufficient evidence that the minority communities within the proposed minority districts are compact, especially in light of the bizarre shapes and the fact that the cities of Sugar Land and Rosenberg are split.

71% of the 3.5 seats anchored there in Plan H283. Joint Expert Ex. E-5 (Martin report) at 12.

Defendants argue that Fort Bend County was represented by two Republicans and one Democrat, and the incumbents signed off on the districts. Docket no. 1272 at 77; docket no. 1249-1 at 27-29 (citing April 27, 2011 House Journal Supp (D-190) at S766 wherein Rep. Howard says all three members worked together and signed off the configuration and do not want to change it). Defendants further assert that Plaintiffs fail to prove dilutive effect because it was not possible to create an additional district in which any single minority group was a majority of the citizen voting age population, and Plaintiffs failed to prove the necessary cohesion among Asian-American, African-American, and Hispanic voters for a coalition district. Docket no. 1272 at 79.

NAACP Plaintiffs contend that Defendants' response to claims that redistricters fragmented the minority community seems to rest solely on the fact that the map for the area was approved by all delegates, including one Democrat. Docket no. 1294 at 14. However, they argue that, rather than this being a member-driven map, Interiano testified that he drew it with input from the members, and he noted that the two Republican members wanted their districts to remain Republican through the decade even though this was a diverse and rapidly growing area of the state. *Id.* (citing TrJ1604-05, TrJ1607, TrJ1571). They argue that Defendants ignore Interiano's role and stated purposes.

The Court finds that Plaintiffs have failed to establish their claim of intentional vote dilution in Fort Bend County because they have failed to show that mapdrawers acted with a racial purpose as opposed to a partisan

purpose. The district configuration came from the members, including minority Democrat member Reynolds. Though there are precinct splits, Plaintiffs failed to prove that they were racial, and Defendants offered race-neutral explanations for the bizarre shape of HD26. Although Interiano testified that he wanted to keep the Republican districts Republican throughout the decade, there is no indication that he used race to do so.

I. Dallas County

In addition to the one person, one vote claims brought by certain Plaintiffs in Dallas County, Plaintiffs argue that mapdrawers used packing and cracking to dilute minority voting strength, despite the fact that Anglo population declined and all growth in the County was minority growth.[49] Docket no. 1280 at 35-36 ("Areas in the

---

[49] For their § 2 results claim, the NAACP offers demonstration Plan H202, with HD107 as a proposed new coalition African-American opportunity district with 23.9% HCVAP and 26.5% Black Alone CVAP using 2005-2009 ACS data. Docket no. 406 at 32; Joint Ex. J-25. This Court's interim plan H309 did not alter the Dallas County configuration, though the current map makes some changes to districts 103 and 115. Thus, this claim remains ripe for determination in the 2013 plan case. The NAACP Plaintiffs offer Fairfax's opinion that the district is reasonably compact, contiguous, respectful of political subdivisions, and capable of being legally enacted by the Legislature. Tr840-41; docket no. 267-1 (Fairfax Supp. Report) at 7. However, on the current record Plaintiffs have failed to show that Plan H202 contains *more* compact minority opportunity districts than Plan H283 in Dallas County. Plaintiffs focus their evidence and briefing on establishing the *Gingles* preconditions for HD107, but fail to demonstrate that sufficient other districts make the preliminary showing and qualify as compact § 2 opportunity districts. To make the comparison required by *De Grandy* when Plaintiffs alter all fourteen districts in a county, as is done here, Plaintiffs must do more than simply point to a single new district that

county where the greatest minority population growth occurred were divided amongst several districts, with heavy minority populations being carved out and added to already existing minority districts.") (citing TrJ1424 (Korbel)). Plaintiffs note that the Anglo population of Dallas County decreased by over 198,000, while the Hispanic population grew by 243,211, the African-American population grew by 73,016, and the Asian population grew by 30,302 (a total of approximately 350,000), yet no new minority districts were created and

---

does not exist in Plan H283. Rather, at a minimum, they must show that all of their proposed minority opportunity districts within Dallas County in Plan H202 are reasonably compact districts under *Gingles* and that there are more than in Plan H283. Although they provide population and compactness statistics for their proposed districts, they fail to provide evidence that the minority populations contained therein are compact, taking into account traditional redistricting principles, as is required by the first *Gingles* precondition. Fairfax's report was admitted without objection, but it contains only demographic information concerning the minority population percentages of the districts, various compactness measures of the districts (Reock, Schwartzberg, Polsby-Popper) (including for the districts in Plan H283), district population deviation, contiguity, and county and VTD splits. Fairfax notes that "[t]here are some compactness ratios that measure the dispersion of the district's population" but "[f]or this analysis only the geographic dispersion measurements were calculated." Docket no. 267-2 at 6 n.7; *see also* docket no. 267-1 at 3 n.3). Fairfax concluded that the districts in Plan H202 were all within 10% overall deviation and were contiguous and that Plan H202 "met standard districting criteria and could be adopted by the state legislature." Docket no. 267-2 at 10. This is insufficient to satisfy Plaintiffs' burden under *Gingles*. *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 741 (S.D. Tex. 2013) ("[T]he Court finds that the three quantitative metrics of compactness used by Plaintiffs are probative, but not themselves determinative, on the question of compactness.").

"there is some evidence that a minority opportunity seat in the county was lost." Docket no. 1280 at 35 (citing TrJ1423 (Korbel)); docket no. 401 at 9. The Perez Plaintiffs argue that the fact that Anglos are only 33% of the Dallas County population but will control 58% of seats required sophisticated line drawing. Docket no. 401 at 9.

Specifically, Plaintiffs primarily argue that: (1) in western Dallas County, existing Latino districts (HD103 and HD104) were packed (and overpopulated) to waste Latino votes and prevent additional minority opportunity or influence; (2) benchmark HD105 and HD106 were becoming minority-majority districts and .on track to provide minority opportunity, but Anglo population in HD105 was increased so that it could not perform for minorities and HD106 was eliminated; and (3) in northeast Dallas County, significant minority concentration is cracked among five Anglo-dominated districts (107, 112, 102, 113, and 114) to eliminate emerging minority districts and dilute the minority vote.

Defendants acknowledge that although it was a "drop-in county," there was no delegation map, and Defendants state that "Downton therefore worked with several Dallas delegation members to ensure that districts with high SSVR maintained high SSVR" and "worked to protect incumbents to the extent Dallas's population decrease allowed." Docket no. 457 at 70; docket no. 1249-1 at 18-22. Downton testified that because the Dallas County delegation was losing two Republican seats and could not agree on a County proposal, he drew the Dallas County districts, starting with HD103 and HD104, to ensure their SSVR levels remained at benchmark. Defendants contend that "race was a consideration in plan H283 only [to] the extent necessary to comply with the State's legal

obligations." Docket no. 457 at 70. Specifically, they note that changes were made to HD103 and HD104 to respond to Hanna's concerns, and that the configurations of HD104 and HD105 were attributable to partisan and neutral motives (pairing Anderson and Harper-Brown, limiting the number of districts within Grand Prairie) and VRA compliance (maintaining HD104's SSVR over 50% and maintaining HD103's SSVR near benchmark). Docket no. 1249-1 at 20. Defendants contend that no additional Latino and African-American opportunity districts could be drawn while maintaining existing opportunity districts.

The United States asserts that mapdrawers "intentionally prevented the emergence of a Hispanic opportunity district in Dallas County." Docket no. 1279 at 51. The United States notes that due to population changes, HD106 elected the Hispanic-preferred candidate in 2006 and 2008, and HD105 came within 20 votes of electing the minority-preferred candidate in 2008. *Id.*[50] It asserts that the districts showed a strong trend toward electing the Hispanic-preferred candidate, especially in Presidential election years. *Id.* at 51-52. The United States argues that, "[w]ith the additional minority population growth in the area, state officials realized that the minority population had a very real possibility of electing its candidate of choice in 2012, and those officials impermissibly used race to make HD105 in the 2011 Plan more Anglo." *Id.* at 51.[51] The United States contends that

---

[50] In the § 5 preclearance litigation, the D.C. Court rejected the claim that HD106 was a lost ability district. *Texas v. United States*, 887 F. Supp. 2d 133 at 175.

[51] The Perez Plaintiffs contend that HD105 can only be explained by racial line drawing. Docket no. 1263 at 5. They assert that, as

mapdrawers reversed the demographic trend in HD105 by increasing Anglo VAP by 5%, which was accomplished by "stretching the district almost the entire length of Dallas." *Id.* at 52. It notes that this demographic change had a corresponding effect in the election analysis, with HD105's election score dropping from 7/9 contests in 2008 to 0/9. Id.; docket no. 1278 FF532.[52]

The Perez Plaintiffs assert that the "manipulation" of HD103, HD104, and HD105 was racial and intentionally frustrated the creation of an additional minority district. Docket no. 401 at 9-11. The Perez Plaintiffs acknowledge that the explanation for the shape of HD105 was the need to pair Anderson and Harper-Brown in a Republican district, but they contend that this intentionally diluted minority voting strength in HD105 and forced Hispanic population into HD104 and that fingers were sent into northwest Irving from HD103 to withdraw Latino population. *Id.* at 9-10 (citing Martin Tr323). They note that HD103 became the most overpopulated district in the County and that overpopulation of these west Dallas districts frustrates the creation of an additional minority district. *Id.* at 10-11.

Similarly, the Perez and the NAACP Plaintiffs contend that making HD105 Anglo required "major

---

Korbel explained, HD105 had experienced a drop in Anglo VAP to less than 40%, so to "remedy this," "precinct splits took a long finger of heavily Hispanic blocks (now precincts 4653, 4654, and 4659) to be packed into HD103, and a lightning bolt went into former HD106 to add concentrations of Anglo voters." Id. (citing Perez-133 at 12).

[52] The United States analogizes these facts to what occurred in *LULAC v. Perry*, 548 U.S. at 400. Docket no. 1279 at 52. In *LULAC*, Hispanic voters had not yet elected their preferred candidate within the district, but were poised to do so.

manipulation." Docket no. 1303 at 3. They argue that precinct splits removed heavy Hispanic blocks into HD103 and HD104 and packed them to preserve HD105 as Anglo. They thus contend that HD103, 104, and 105 "manifest racial gerrymandering and minority vote dilution." *Id.*

To the extent Plaintiffs rely on the fact that all the growth in Dallas County was minority and that Anglo population decreased, the Court notes that the CVAP growth was not nearly as high as the total minority population growth. Dallas went from 14.11% HCVAP in 2000 to 19.17% under the 2005-2009 ACS data available to the Legislature (the 2008-2012 ACS data indicates 20.39% HCVAP). D-230, D-218, D-231. Under the 2005-2009 ACS data, though Dallas had a total population of 2,383,125, it was estimated that approximately 423,000 were not citizens. D-218. Further, while the total Hispanic population was estimated at approximately 900,000, only about 550,000 of those were citizens, and only 256,195 were Hispanic citizens of voting age. Nevertheless, two out of fourteen districts (about 14%) remains less than proportional to the HCVAP. Though fairness would seem to indicate that Hispanics be given more districts to achieve proportionality because their population growth prevented the loss of even more districts, mapdrawers were not required to draw Latino districts simply to achieve proportionality.

In that regard, the Court finds that Plaintiffs have failed to prove intentional vote dilution with regard to their cracking claims in northeast Dallas County. Specifically, they have failed to show that mapdrawers acted with an intent other than maintaining their Republican districts or that they used race for partisan

advantage. Because of the high correlation between race and party, splitting Democrats, eliminating Democratic districts, and shoring up districts for Republican incumbents necessarily affects minorities, but that alone is not intentional vote dilution based on race.

The Court does find, however, that Plaintiffs have proven an improper use of race in western Dallas County to dilute Latino voting strength. The configuration of HD103, HD104, and HD105 is undisputably based in large part on race. Downton admitted to using racial shading at the block level to remove Hispanics from HD105 and place them into HD103 and HD104. Downton denies that any use of race was racially discriminatory, however, arguing that the shape of HD105 is governed by the need to pair the residences of Republican incumbents Harper-Brown and Anderson within HD105 and make the district more Republican to ensure that one of them could get re-elected. He further contends that HD103 was drawn in part with Rep. Anchia and that race was used to ensure that its SSVR remained at benchmark levels to avoid retrogression. Although he did not confer with Rep. Alonzo about HD104, he asserts that it was drawn to ensure that its SSVR was above 50%. While these explanations have some superficial truth, the Court finds that the configuration uses race in part in a racially discriminatory manner to intentionally dilute minority voting strength to protect a Republican incumbent in HD105 by intentionally making the district more Anglo.

Mapdrawers and redistricting leadership were hostile to the creation of a new Latino district in Dallas County because they felt it would be a Democrat district and result in the further loss of a Republican seat there beyond the two already required by the lack of growth in

Dallas County overall. With regard to Dallas County, David Hanna expressly stated that they would already be losing two Republican seats but it may get "worse" because they might have to draw a third Latino district, which would mean the loss of a third Republican seat. D-192. Rather than exploring whether any additional minority districts could be drawn or maintained to recognize the population growth, they eliminated districts that were on track to perform for minority voters.

Faced with existing districts 103 and 104 that mapdrawers felt had to be maintained and two Republican districts that had become majority-minority in terms of VAP and were becoming less reliable for Republicans, mapdrawers decided to eliminate HD106, the district that had actually become majority-minority CVAP (using 2008-2012 ACS data, though still Anglo-CVAP majority using 2005-2009 ACS data available to the Legislature) and had elected the minority-preferred candidate in two of five elections. Consistent with their incumbency-protection plan, they paired the Republican incumbents of HD105 and HD106 in a shored-up district. While this could be acceptable partisan gerrymandering (at least under current Supreme Court law), their use of race in doing so renders it impermissible.

Downton shored up HD105 by making it more Anglo (and thus more Republican)—he admitted to splitting precincts to put the Hispanic population into HD104 and HD103 and the Anglo population in HD105. Though he claimed this use of race was only to preserve the SSVR of those districts, the Court finds that this was yet another example of mapdrawers using superficial compliance with the VRA to dilute minority voting strength rather than enhancing it.

Although Hanna had suggested giving thought to raising the SSVR of HD104 above 50%, he also clearly stated that it could be argued that HD104 "will likely perform at 45.6 SSVR since this is similar to the performing level it was drawn at in 2001." D-122. Downton relied on the 50% SSVR threshold in bad faith to waste Latino votes in HD104 because there is no indication that HD104 needed to be at 50% SSVR to continue performing. Further, although HD103 was maintained at benchmark SSVR, there is no indication that mapdrawers thought this was actually necessary for VRA compliance. Downton admitted that he did not think HD103 was an opportunity district (based on his 50% SSVR requirement), and testified that they maintained the SSVR only to "try to stave off any possible legal challenge." Downton 8-31-11 depo. (Joint Ex. J-62) at 97. Jeff Archer had stated that HD103 was not a Latino opportunity district, *see* D-134, and there is no indication that any election analysis was done indicating that its SSVR number needed to be maintained to comply with the VRA or to keep the district performing. Thus, Downton's testimony is not credible.

The Court finds that Downton did not believe that raising the SSVR of HD103 was necessary but he saw it as an opportunity to make HD105 more Anglo and safer for the Republican by placing that Latino population into HD103. Thus, although the use of race was claimed to comply with the VRA, the Court finds that the true motive was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos in HD103 and HD104 while simultaneously making HD105 more Anglo to protect the Anglo Republican incumbent who would emerge from the Republican primary.

The Court finds that the § 2 results claims are best addressed in the 2013 plan case. However, the Court finds that mapdrawers improperly used race with an intent to dilute Latino voting strength by wasting Latino votes in HD103 and HD104 and creating a more Anglo HD105 to protect the Anglo Republican incumbent in the general election. This intentional vote dilution in Dallas County violates § 2 and the Fourteenth Amendment.

J. Tarrant County

The Perez and NAACP Plaintiffs cite Tarrant County as an example of intentional vote dilution through intentional minority fragmentation. Docket no. 1263 at 5; docket no. 1303 at 3. The Perez Plaintiffs argue that Plan H283 does not recognize the substantial minority growth in Tarrant County, freezing the number of minority districts at three. Docket no. 401 at 14. They assert "that Districts 90, 93, 95 and 96 reflect racial gerrymander and consequent dilution." Docket no. 1303 at 3. Citing Martin's report and Korbel's report, they contend that Plan H283 minimized minority seats by packing minorities into HD90 and HD95 through bizarre configurations to dilute HD96 (preserving the Republican incumbent) and by creating HD93 as an elongated spike that splintered the minority community. Docket no. 1303 at 3; docket no. 401 at 14.

The configurations of HD93, HD90, and HD95 are indeed bizarre, and Plaintiffs contend their bizarre shape can only be explained by racial gerrymandering. The evidence indicates that the initial County configuration in Plan H113 was a delegation-proposed map, although the two minority-district representatives Veasey and Burnam asserted that they approved of only their own districts.

Although Martin opined that HD90 and HD95 are packed, there is no indication that they were packed at this point. Their Black+Hispanic total population and B+HVAP numbers remained relatively close to and slightly below benchmark, despite the fact that substantial population had to be added to the districts.

Because Hanna raised concerns about the SSVR in HD90 dropping from the benchmark (from 45% to 40% total SSVR) and MALDEF had asserted that its SSVR could be raised over 50%, and because they believed they could "offset" the loss of HD33, Downton and redistricting leadership decided to raise the SSVR of HD90 above benchmark levels to 50.1% (non-suspense), without consulting the representatives of those districts. There is no indication that HD90's SSVR needed to be increased to that level to remain a performing ability-to-elect district.

There is undisputed evidence that mapdrawers manipulated the population based on race, removing some areas and swapping out population to increase the SSVR of HD90 from 40/41.9% in Plan H113 to 47.9/50.1%. There is little indication that they cared about traditional redistricting factors or maintaining communities of interest; they were only concerned with raising the SSVR to 50.1%. The district became the most underpopulated district in the plan. The African-American community of Como was removed from HD90 and placed into a Republican district represented by Anglo Rep. Geren. Other population was swapped between HD90 and HD95, and between HD90 and HD93. Overall, substantial Anglo population was removed (approximately 12,000 total population and 11,000 VAP), while Black+Hispanic total population and B+HVAP was increased.

While at first blush, this appears to be an extreme instance of packing in HD90, the changes cannot be evaluated in isolation. As noted, the African-American community of Como was removed and placed into an Anglo district; this is not packing. Much population was swapped between HD90 and HD95, another minority district. In HD95, substantial Anglo population was added, while substantial minority population was removed, lowering the Black+Hispanic total population percentage as well as B+HVAP. Considering the population changes in HD90 and HD95 together, total population decreased by 4,100 Anglo and 4,200 Black+Hispanic, and voting age population decreased by about 3,600 Anglo and 3,300 B+HVAP. Thus, claims that HD90 and HD95 were packed are not supported by the evidence.

However, increasing the SSVR of HD90 was merely superficial compliance with the VRA, invoked in bad faith to actually undermine Latino voting strength. As discussed, Defendants ignored DOJ guidance that ability to elect was not measured simply by a demographic criterion and claimed that they could "offset" the loss of existing Latino opportunity and ability district HD33 by increasing the SSVR of an existing ability district above 50%, even though they knew this did not create a new ability district. Further, although they did not use the 50% SSVR pretext to pack HD90 and HD95, they did use it to shore up HD93 as an Anglo district. Between Plan H113 and Plan H283, approximately 1,460 Black+Hispanic total population and 830 B+HVAP were removed from HD93 and approximately 435 Anglo total population and 413 Anglo VAP were moved into HD93, increasing the Anglo CVAP from 65.7% to 66.5%. The Court finds that

mapdrawers acted with racially discriminatory intent to dilute Latino voting strength in Tarrant County.

K. McLennan County

MALC, the NAACP Plaintiffs, and the Perez Plaintiffs assert that there was intentional vote dilution in McLennan County.[53] Docket no. 1263 at 4; docket no. 1280 at 34-35. They note that benchmark HD57 was created in the *Graves v. Barnes* litigation, 378 F. Supp. 640 (W.D. Tex. 1974), and the minority community remained intact in that district for almost 40 years, electing the minority candidate of choice, until 2010. Docket no. 1263 at 4 (citing TrJ1442-43 (Korbel)); docket no. 1280 at 34. Benchmark HD57 had become majority-minority in terms of total population, though it remained majority-Anglo CVAP. Perez Plaintiffs and the NAACP Plaintiffs argue that majority-minority HD57 was radically altered and converted to an Anglo-majority district. Docket no. 1303 at 5.

County Commissioner Lester Leon Gibson testified that the minority community had elected their candidate of choice in HD57 from 1998 until the 2010 election, when Anglo Republican Marva Beck won the district. TrJ1828-29 (Gibson). Plaintiffs contend that, to protect that incumbent, mapdrawers removed largely minority areas of Waco from HD57 and replaced them with more Anglo areas (creating a district that was 55.2% Anglo in terms of total population), splitting minority communities of

---

[53] Defendants point to the ambiguity in the Perez Plaintiff's live pleading concerning whether they are alleging claims against Plan H283. Docket no. 1272 at 92 n.35. As discussed previously, it was clear during trial and from the Perez Plaintiffs' arguments and post-trial briefing that they are challenging Plan H283.

interest and diluting minority voting strength.[54] Korbel testified that, instead of preserving the majority-minority character of HD57, Plan H283 removed 23,000 people, 70% of whom were minority, and imported 20,000 persons, who were more than 80% Anglo, cracking minority voting strength. TrJ1444 (Korbel); *see also* docket no. 1263 at 4. The Legislature changed the district number to HD12 and took out minority precincts in McLennan and Brazos Counties and added Limestone County. TrJ1443-44 (Korbel); TrJ1841 (Gibson). The Perez Plaintiffs contend that the reconfiguration intentionally cracked and fragmented minority voters to dilute their voting strength. Docket no. 1263 at 4. Korbel testified that the majority-minority character of the district could have been maintained, thus preserving minority opportunity to elect. TrJ1445 (Korbel); *see also* docket no. 1280 (NAACP Brief) at 35.

Defendants contend that Plaintiffs have failed to prove that the districts were drawn with the purpose of diluting any group's voting strength, and that Commissioner Gibson was not familiar with the 2011 House plan and had

---

[54] Plaintiffs showed in Plan H363/Plan H367 that the same three districts could be configured in a way that would have created a majority-B+HCVAP district using 2008-2012 ACS data. This district maintains much of the benchmark configuration, including portions of McLennan County and all of Falls and Robertson Counties, but adds a portion of Brazos County including part of the City of Bryan. However, Plaintiffs failed to proffer sufficient evidence showing that the minority community in HD57 is compact, taking into account traditional districting principles. Plaintiffs also offered insufficient evidence of racially polarized voting for McLennan County. Plaintiffs have thus failed to prove a § 2 results claim with regard to Plan H283 but may raise this claim in the 2013 plan case.

not looked at any figures showing whether there was vote dilution. Docket no. 1272 at 93.

Although McLennan County fits the pattern of diluting minority voting strength in districts with significant minority population that had elected a Republican who was not the minority candidate of choice in 2010, Plaintiffs have failed to provide sufficient evidence of racial means or motive to establish an intentional vote dilution claim. It is insufficient to show effects, without evidence demonstrating intent. Coupled with the lack of statistical evidence of racially polarized voting in this County, the lack of evidence of intent leads the Court to conclude that Plaintiffs have failed to prove intentional vote dilution.

L. Bell County

MALC and the NAACP Plaintiffs contend that § 2 required the creation of a minority coalition district in Bell County. MALC, NAACP, and Perez Plaintiffs further contend that Bell County is evidence of intentional vote dilution. MALC's Third Amended Complaint alleges that in Bell County, African-American and Latino population growth exceeded 51.64% and the minority community is geographically compact and politically cohesive in the City of Killeen. Docket no. 897 ¶ 54. MALC contends that Plan H283 "unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections." *Id.* The Perez Plaintiffs also allege intentional discrimination with regard to HD54. Docket no. 960 (Sixth Am. Compl.) ¶ 28.[55]

---

[55] Although Defendants again say it is unclear if the Perez Plaintiffs are challenging the 2011 plan in addition to the 2013 plan, the Perez Plaintiffs presented claims against the 2011 plan at trial,

The NAACP Plaintiffs say that the City of Killeen is exceptionally diverse in part because of its unique relationship with Ft. Hood and that, because of its unique interests, it benefits from being kept whole. Docket no. 1280 at 31-32 (citing TrJ1706-7 (Jones)). It was kept nearly entirely whole in the benchmark HD54, with only about 200 individuals from Killeen excluded. TrJ1403 (Korbel). The NAACP Plaintiffs note that the City of Killeen experienced tremendous population growth over the decade, and HD54 was overpopulated. Docket no. 1280 at 32 (citing TrJ1706 (Jones); Tr TrJ1401-2 (Korbel)). MALC, Perez, and the NAACP Plaintiffs further note that, once Burnet County was removed, HD54 was short 13,000 voters, but instead of adding voters to the existing core of HD54, which already contained almost the entire City of Killeen, mapdrawers removed approximately 33,000 voters from Killeen, 2/3 of whom were minority, and added in Anglo voters. Docket no. 1280 at 32 (citing Tr1402-5 (Korbel)); docket no. 1263 at 5. In Plan H283, both HD54 and HD55 are majority-Anglo CVAP and the City of Killeen is split between the two districts.

NAACP Plaintiffs contend that Plan H202 "created a new African American [coalition] opportunity district in

---

briefed this claim in their 2014 Post-Trial Brief (docket no. 1263 at 4), and included proposed conclusions of law after the 2014 trial that include HD54 in Plan H283 as having the purpose and effect of minimizing and diluting minority voting strength in violation of § 2 and the 14th Am (docket no. 1265 CL2). The Perez Plaintiffs' joint briefing with the NAACP asserts that HD54 was racially gerrymandered to protect a Republican incumbent by splitting Killeen and fragmenting the minority population using race as a proxy for partisanship. Docket no. 1303 at 4.

Bell County." Docket no. 406 at 33. In 2011, HD54 was proposed as a multi-ethnic minority coalition of 28.7% Black Alone CVAP, 17.7% HCVAP, 3.2% Asian CVAP, and .8% Indian American (46.4% Anglo CVAP) using 2005-2009 ACS data. Joint Map Ex. J-25. Fairfax testified that it would be a majority B+HCVAP district (30.99% BCVAP and 22.3% HCVAP for combined B+HCVAP of 53.29%) in 2014. TrJ912. NAACP Plaintiffs note that Fairfax found it to be a majority-minority district and that it was compact, contiguous, respected political subdivisions, complied with traditional redistricting criteria, and could be adopted by the Legislature. Tr842-43.

Although the NAACP Plaintiffs offered no expert evidence of racially polarized voting specific to Bell County in 2011, they contended that "the statewide analyses performed by Dr. Kousser, Dr. Ansolabahere, and Dr. Lichtman finding racially polarized voting in Texas are all applicable to Bell County," and they also relied on the lay testimony of Phyllis Jones, a long-time resident of Bell County. Docket no. 406 at 34; docket no. 408 at 8. They further noted that districts between 35-45% BVAP and total minority population around 70% are generally effective minority coalition districts, citing congressional districts 9, 18, and 30 as examples. Docket no. 406 at 35. In addition, Defendants stipulated during trial that racially polarized voting exists throughout Texas, other than in Nueces and Kleberg Counties.

Plaintiffs fail to prove that HD54 as drawn in Plan H202 was required by § 2 in 2011. According to the ACS data available to the Legislature, it was not majority-minority-CVAP without combining three or four minority groups, and there is no indication that Plaintiffs had

provided the necessary evidence concerning multi-ethnic cohesion. Thus, the Legislature's intentional failure to create the district was not, standing alone, intentional vote dilution.[56]

However, the evidence does indicate that mapdrawers (specifically Aycock) intentionally racially gerrymandered the districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in, thus cracking and diluting the minority vote to ensure Anglo control over both districts. Aycock was not the minority candidate of choice and often voted against NAACP positions. TrJ1703-5 (Jones); TrJ1751 (Aycock). The Perez Plaintiffs note that Killeen is heavily minority, "there has emerged an effective minority political coalition around municipal policies," and that a "minority candidate [Brown] recently ran a reasonably strong campaign against the incumbent," which Plan H283 addressed "by cynically splitting the Killeen minority community." Docket no. 1263 at 4-5; TrJ1705 (Jones); *see also* TrJ1696-97 (Jones) (noting that minority voters had elected their candidate of choice to city council).

Defendants assert that HD54 "was drawn for race-neutral reasons and without a racially discriminatory purpose." Docket no. 1276 CL54. They contend that the Bell County configuration was created by the two members of the delegation (Jimmie Don Aycock (HD54) and Ralph Sheffield (HD55)), that it reflects the "give and take" between them, and that the demographic figures in

---

[56] To the extent Plaintiffs offer post-2011 plans and expert evidence of racially polarized voting in 2012 through Dr. Brischetto, those § 2 claims are better addressed in the 2013 plan trial.

H100 and H283 are largely the same. Docket no. 1249-1 at 32-34; docket no. 1272 at 49-51; docket no. 1276 FF145. Defendants note that most of Killeen is in HD54 and that Killeen had been divided in prior plans (and is divided in NAACP Plaintiffs' proposed Plan H202), that minority CVAP increased in HD54 and Anglo CVAP decreased from 59.4% to 56.1%, and that Aycock testified that he felt that Lampasas County had more in common with Killeen than Temple and Belton (TrJ173-34). Defendants argue that, as drawn in Plan H283, "the Bell County House districts reflect the goals identified by Representative Aycock and they do not diminish minority voting strength." Docket no. 1272 at 51.

After the loss of Burnet County due to the population increase, Reps. Aycock and Sheffield were limited in their district configurations. Rep. Aycock drew the lines and "knew where the voters were and where [he] wanted to draw those lines." TrJ1755 (Aycock). Aycock wanted more "Republican" areas and he knew that a minority coalition district would not likely have enough Republicans to re-elect him. TrJ1741-44, TrJ1769 (Aycock). Aycock drew the district to split the City of Killeen and the minority community. Although plans were introduced during the session (such as Plan H202 and Plan H232) that would have kept the City of Killeen more whole in one district, these plans were rejected, and Aycock testified it was because Lampasas County was more aligned with western Bell County than with Temple/Belton, so it was beneficial for them to remain in a district with Killeen.

As noted in the fact findings, the Court does not find this testimony credible. Aycock also objected to plan H201 because it had a "land bridge" joining Killeen with Temple

and Belton, though he admitted that Plan H283 includes land bridges in other areas and he voted for it. This again indicates that Aycock's objections to minority-proposed plans were pretextual. Further, the fact that Anglo CVAP decreased in HD54 was due to the fact that minority population growth accounted for more than 70% of the growth in Bell and Lampasas Counties and the exclusion of more Anglo Burnet County. The Court finds that the decision to split Killeen and the minority community within it was to ensure that HD54 and HD55 remained Anglo-majority, and would reelect Republican incumbents. Minority communities were removed and Anglo areas were moved in, which made it more difficult for minority voters in HD54 to elect their candidate of choice.

Plaintiffs presented some lay testimony of minority cohesion through Phyllis Jones of Killeen.[57] Dr. Brischetto found racially polarized voting in the 2012 elections in Bell County. Thus, splitting the minority community was an effective way to dilute the minority vote and ensure that the bloc-voting Anglo majority would defeat minority-preferred candidates. The Court thus finds evidence of intentional vote dilution in Bell County in violation of § 2 of the VRA and the Fourteenth Amendment.

M. Midland/Ector Counties

MALC contends that a new Latino opportunity district was required in Midland and Ector Counties. Defendants assert that, under the 2010 census, both Midland and Ector Counties were entitled to the same

---

[57] Jones also testified that minority voters are sometimes faced with lack of translators or more rigorous questioning about ID. TrJ1699-1703.

number of districts (0.8) as in 2000, so the configuration in this area is largely unchanged. Docket no. 1249-1 at 37. Following the County Line Rule, the two districts in Plan H283 are composed of whole counties—HD81 contains Andrews, Winkler, Ector, and Ward Counties, while HD82 contains Dawson, Martin, Midland, Crane, and Upton Counties. No party has asserted that a Latino opportunity district could be drawn in this area utilizing whole counties and respecting the County Line Rule. MALC proposes a new Latino opportunity district (HD81) in this area in Plan H205, Plan H295, Plan H329, and Plan H360, all of which involve County Line Rule violations.

In Plan H205, proposed HD81 splits Midland and Ector Counties (along with the cities of Midland and Odessa) and joins them with six whole counties to the west plus an odd-shaped extension into Winkler County that splits the cities of Kermit and Monahans. Excising the Hispanic populations from four cities and towns spread across three counties does not respect political subdivisions. These Hispanic populations are not compact, taking into account traditional districting principles, and appear to be joined based solely on their race.

In Plan H295's HD81,[58] Midland and Ector Counties are again split, along with the cities of Midland and Odessa, and these partial counties are joined with six whole counties and a bizarrely shaped extension into Tom Green County excising a cross-section of the City of San Angelo and dividing it into three pieces. This plan suffers the same deficiency as Plan H205, but in this case the

[58] Plan H296 has the same proposed HD81.

Hispanic populations of Midland and Odessa are excised and joined with the Hispanic population in San Angelo several counties over. MALC has failed to show that the Latino community contained in HD81 is compact, taking into account traditional districting principles.

MALC has failed to satisfy the first *Gingles* precondition for its plans presented during the 2011 legislature and 2011 trial phase of this case.[59] The Court also finds that the Legislature's failure to create these proposed districts in 2011 was not intentional vote dilution.

N. Lubbock County

MALC contends that an additional Latino opportunity district was required in Lubbock County and the surrounding areas. In the benchmark plan, HD84 was centered in the City of Lubbock, though it did not encompass all of Lubbock and included areas to the north and east beyond the city limits. The remainder of Lubbock in the southwest and the rest of the County was placed in HD83 and joined with other counties. In Plan H283, all of HD84 is located within the City of Lubbock. The rest of the City and County is joined with almost all new counties (except for Gaines County) in HD83.

The idea of creating a Latino opportunity district based in part in Lubbock was presented to the Legislature via MALDEF's Plan H115. That plan creates a long, bizarre district that connects two whole counties with parts of nine of other counties. No party offers this plan as a demonstration plan, but Figueroa testified

---

[59] MALC also offered Plan H329 and Plan H360. The Court finds that the § 2 results claims based on these plans are best addressed in the 2013 plan trial.

before the Legislature that this plan was drawn in part to "see if Latinos were being split because of the county line rule." D-595 at 74. The proposed district not only snakes through various counties but splits numerous cities (including Amarillo, Hereford, Dimmitt, Plainview, Littlefield, and Slaton) in addition to dividing the City of Lubbock into three districts to reach 51.6% HCVAP. When asked how this map showed respect for political subdivisions, Figueroa responded that it did not split VTDs and that it drew "as many counties as we could whole" though he acknowledged that only two of ten counties are whole in HD87. D-595 at 16-17. The shape of Plaintiffs' proposed district suggests that it is not the County Line Rule, but the dispersion of the Latino population that is responsible for the lack of a Latino opportunity district in this area.

MALC offers Plan H205, which was also introduced during the 2011 legislative session, with proposed HD84 (53.3% HCVAP) that excises the middle of the City of Lubbock and joins it with all of Crosby County and parts of twelve more counties stretching north and south in a bizarrely shaped, convoluted district. Defendants argue that HD84 violates the County Line Rule eleven times, is clearly drawn based on race, and has compactness scores that are two times higher (*i.e.*, worse) than any of the district scores in Plan H283. Docket no. 457 at 29 (citing Joint Ex. J-26, Giberson Report (Ex. E-18) at 7-8); docket no. 645 at 16.

Like in Plan H115, HD84 splits the City of Lubbock among three districts, and splits numerous other cities such as Littlefield, Tulia, Dimmitt, Hereford, Amarillo, Brownfield, and Lamesa. It has low compactness scores

and in fact appears "irrational on its face." Again, the shape of the proposed district suggests that the Latino population in West Texas is too dispersed to be considered compact, and is not compact taking into account traditional redistricting principles such as respect for political subdivisions. *See Shaw v. Reno*, 509 U.S. 630, 651-52 (1993) (noting that it is "permissible for a State, *employing sound districting principles such as compactness* and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority.") (quoting *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 168 (1977) (emphasis in *Shaw*)).

A district that includes "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. "It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls" and such "impermissible racial stereotypes" have been rejected. *Id.* MALC has not proffered sufficient evidence to demonstrate that the populations included in this proposed district were included for reasons other than their race. Thus, MALC has failed to satisfy the first

Gingles precondition for its plans presented during the 2011 legislature and 2011 trial phase of this case.[60] The Court further finds that the Legislature's failure to draw this proposed district in 2011 was not intentional vote dilution.

---

[60] During the 83rd legislative session in 2013, MALC offered Plan H329 with HD88 in Lubbock County. Docket no. 1273 at 12; MALC-100. HD88 has 47.2% HCVAP using 2005-2009 ACS data and 50.9% HCVAP using 2008-2012 ACS data. D-322; MALC-102. MALC asserts that HD88 is "reasonably compact, split only the same county already split under H283 in Lubbock, and brought together a cohesive Hispanic population to provide an opportunity for electoral success." Docket no. 1273 at 12. The Court finds that the results claim based on Plan H329 is best addressed in the 2013 plan case.

However, the Court notes that MALC's focus on comparing compactness scores in its proposed plans with those in the enacted plan is misplaced. MALC argues throughout its briefing that where its proposed districts are comparably compact or more compact than enacted districts, that shows compactness and/or that MALC did not ignore traditional districting principles. *E.g.*, docket no. 459 at 14; docket no. 1273. Whether a district is compact for § 2 purposes is not determined by comparing the district's compactness score to districts in the enacted plan, which is unquestionably politically gerrymandered. Rather, "§ 2 embodies its own requirement of compactness" regardless of whether the state has drawn compact districts. *Diaz v. Silver*, 978 F. Supp. 96, 130 (E.D.N.Y. 1997). Thus, MALC must offer evidence demonstrating that the minority population within its proposed district is compact, taking into account traditional districting principles. In that regard, although demonstration districts are drawn with a focus on achieving a 50% HCVAP, are not required to have the "least possible amount of irregularity," and are not necessarily the district that must be implemented by the State, it is not enough to draw a district solely by gathering in Hispanic population and then asserting that the included Hispanics share some interests in common.

O. Statewide and totality of circumstances

The Task Force asserts that Plan H283 systematically thwarts Latino opportunity wherever it could have been added and has an overall discriminatory effect on Latinos which, in the face of overwhelming population growth, is circumstantial evidence of discriminatory intent. Docket no. 1282 at 26-27. The Task Force points to the strong racial tension and heated debate about Latinos, Spanish-speakers, undocumented immigrants, and voter ID legislation. *Id.* at 29. Flores observed the session and testified that it was the most racially acrimonious he had ever seen. Tr436. The Task Force Plaintiffs further note the rushed process with limited opportunity for public input and the failure to employ proper VRA standards (such as focusing solely on 50% SSVR) or examine § 2 compliance. Docket no. 1282 at 47-50. They argue that redistricters took away opportunities where Latinos were about to oust Republican incumbents in HD78 and HD117 and that Plan H283 disadvantages Latinos to bolster the re-election chances of those incumbents, who were not the Latino candidates of choice. Docket no. 1282 at 66.

The Perez Plaintiffs and their expert Ed Martin contend that mapdrawers and redistricting leadership utilized three main techniques to intentionally dilute the minority vote in Texas to protect Anglo Republican incumbents. These techniques include: (1) packing existing minority districts to prevent the creation of new minority districts by using an arbitrary 50% SSVR standard (except in HD78 where it would have negative consequences for the Republican incumbent); (2) cracking the burgeoning minority population to eliminate effective minority coalition districts; and (3) using population

deviations.[61] Joint Expert Ex. E-5 (Martin report) at 3. By using these techniques, Martin opined that Plan H283 actually reduced the number of effective minority districts[62] by at least five and up to eight districts, despite the massive minority population growth. *Id.* at 4. In contrast, the Perez Plaintiffs argue, Plan H232 contained the same number of County Line Rule violations (one) as Plan H283 yet created at least nine, and possibly twelve, more minority districts than Plan H283. *Id.*

The Court agrees that the overall configuration of Plan H283 is the product of intentional vote dilution. The evidence of the mapdrawing process supports the conclusion that mapdrawers were motivated in part by an intent to dilute minority voting strength. Discussions among mapdrawers demonstrated a hostility to creating any new minority districts, as those were seen to be a loss of Republican seats, despite the massive minority population growth statewide.

Although delegations worked on their respective areas, the overall map was drawn in secret, with no one seeing the statewide map until Plan H113 was released on Wednesday, April 13. Mapdrawers intentionally paid li[illegible]le attention to § 2 compliance, believing that minority members in delegations would ensure VRA compliance, but the member-driven process and the limited role of

---

[61] Plaintiffs bring *Larios*-type one person, one vote claims based on the population deviations, and these claims are discussed below. However, as mentioned above, certain Plaintiffs also rely on the population deviations as evidence of intentional vote dilution under § 2 of the VRA.

[62] Martin defined an effective minority district as one with less than 50% Anglo VAP that had performed for minority voters in the past. Joint Expert Ex. E-5 at 4.

minority members in Harris County were not conducive to compliance. After Plan H113 was released on April 13, the process was extremely rushed, with public hearings on Friday, April 15 and Sunday, April 17, and the plan voted out after the HRC meeting on Tuesday, April 19 (with new Plan H134 released the day before). Few changes were made and no minority opportunity was added. When faced with the fact that the number of opportunity districts had decreased, redistricters chose to artificially inflate the SSVR in existing ability districts HD90 and HD148 to claim nonretrogression and to thwart claims that additional opportunity districts were required, even though they had no reason to believe that doing so was required by § 2 or § 5.

Despite the massive minority population growth, Plan H283 not only failed to create any new minority opportunity districts, it *reduced* the number of minority opportunity districts by eliminating HD33 in Nueces County. Redistricters also intentionally disadvantaged Hispanic voters in Hispanic districts that had elected Republicans in 2010 who were not Latino candidates of choice; they used race impermissibly and intentionally diluted Latino voting strength in HD78, HD117, and HD41 to protect Republican incumbents who were not Latino candidates of choice. The impact of the plan was certainly to reduce minority voting opportunity statewide, resulting in even less proportional representation for minority voters.

Given the existence of racially polarized voting throughout Texas and the evidence of the various *Arlington Heights* factors (incorporated from the fact findings and the Court's Opinion on Plan C185), as well as the totality of circumstances, the Court finds invidious

discriminatory purpose underlies Plan H283. As discussed in the Court's Opinion on Plan C185, it is not necessary for the Court to find that mapdrawers or redistricters acted with actual racial animus or hostility. Rather it is sufficient that redistricters acted to undermine minority voting strength for partisan advantage. Further, although various mapdrawers drew different portions of the map, they did so with authority from the Legislature, and thus their motives, knowledge, and intent must be imputed to the Legislature when it enacted the plan. Thus, Plaintiffs have shown that, with regard to the various specific regions in which this Court has found intentional vote dilution, as well as statewide, redistricters acted at least in part with a racially discriminatory motive and intended to dilute minority voting strength in violation of § 2 of the VRA and the Fourteenth Amendment.

III. *Shaw*-type racial gerrymandering claims

In response to this Court's request for briefing on claims after the *Alabama LBC* opinion was issued, MALC argued that it asserted *Shaw*-type racial gerrymandering claims because it alleged "racial gerrymandering" in its Third Amended Complaint. Docket no. 1306. MALC asserts that it has alleged racial gerrymandering claims to districts 26, 34, 41, 54, 77, 78, 103, 104, 105, 117, and 148. However, the Court finds that MALC did not sufficiently plead a *Shaw*-type racial gerrymandering claim, and that its racial gerrymandering claims are only asserted in the context of intentional vote dilution claims.

The Perez and NAACP Plaintiffs asserted a number of "racial gerrymandering" claims related to districts in Dallas County, Tarrant County, Harris County, Bell

County, McLennan County, Fort Bend County, and joined with MALC in its challenges to Bexar and Nueces Counties and HD41. Docket no. 1303. However, again the Court finds that these claims were phrased in terms of intentional vote dilution, not *Shaw*-type racial gerrymandering claims.

The Task Force Plaintiffs assert that they have alleged *Shaw*-type racial gerrymandering claims against HD117 in Bexar County and "House districts in El Paso County" in Plan H283. Docket no. 1308 at 2. Their current pleading, the Fourth Amended Complaint (docket no. 891 ¶37), alleges that mapdrawers used race as a predominant factor to allocate Latino voters into and out of HD117 and across districts in El Paso County. These claims are brought in addition to their intentional vote dilution racial gerrymandering claims.

Defendants concede that the Task Force Plaintiffs have alleged *Shaw*-type claims with regard to HD117 and the "El Paso districts" but assert that they lack standing to bring the claim against HD117 because they failed to prove that any member of the association resides in the district. The evidence[63] indicates that (1) one named Plaintiff (Sergio Coronado) resides in HD78 in Plan H283; (2) one named Plaintiff (Socorro Ramos) resides in HD75 in Plan H283; (3) one named Plaintiff (Armando Cortez) resides in HD119 in Plan H283; (4) Latino registered voter members of HOPE and MABA reside in HD117 in Plan H283; and (5) Latino registered voter members of

---

[63] As discussed in the congressional plan opinion, the Task Force Plaintiffs' motion to supply evidence concerning the residences of its members is granted and the information is filed under seal.

HOPE and MABA reside in HD77 in Plan H283.[64] Docket no. 1314. This is sufficient to establish standing for the *Shaw*-type claims asserted against HD117 in Bexar County and against HD75, HD77, and HD78 in El Paso County.

The Task Force Plaintiffs rely on both district-specific and statewide evidence to support their *Shaw*-type claims focused on HD117 and El Paso. Docket no. 1308 at 4. In terms of statewide policies focusing on race, they point to evidence that "Texas redistricters mechanically applied a strict threshold of 50% SSVR statewide to measure compliance with section 5, despite the State's awareness that the U.S. Department of Justice did not mechanically apply a demographic threshold to evaluate retrogression." Docket no. 1308 at 5. They argue that "Texas redistricters insisted that districts be drawn with greater than 50% SSVR in order to count as ability to elect districts in the State's retrogression analysis." *Id.*[65] The Task Force Plaintiffs contend that the *Alabama LBC*

---

[64] Although the Task Force asserts that these individuals reside in "the antler," a search of the addresses indicates that they actually live in the "head" of HD77.

[65] The Task Force Plaintiffs note that redistricters increased the SSVR of HD90 and HD148 over 50% in Plan H283 to count them as additional Latino districts in the retrogression analysis, even though they were already Latino ability-to-elect districts. Docket no. 1308 at 5-6 (citing Post-Trial Brief at 58-59). The Court notes that although several parties complain about the State's increase of SSVR in HD90 and HD148 (and the Task Force uses this to support its assertion that redistricters used 50% SSVR as a metric), no party asserts a *Shaw*-type claim directly against these districts. In this context, they point to those districts as further evidence of mapdrawers' view of the importance of having SSVR above 50% in certain districts.

decision made clear that mechanical quotas are not the measure of ability to elect or retrogression.

A. HD117

The Task Force Plaintiffs argue that "Texas's mechanical 50% SSVR test to claim non-retrogression . . . drove redistricters to use race as the predominant and controlling factor in crafting HD117." Docket no. 1308 at 7. They further note that Texas claimed in its post-trial brief that it drew HD117 "to comply with the Voting Rights Act by maintaining the district's SSVR over 50%." *Id.* at 5 (citing Post-Trial Brief (docket no. 1272) at 55).

It is undisputed redistricters determined that HD117 had to maintain an SSVR above 50%. The evidence further indicates that incumbent John Garza and redistricters also determined that it would not exceed 50.1% SSVR. The Task Force Plaintiffs note that Interiano explained that he had to perform a careful balancing act in RedAppl, shading for SSVR and using election results to craft the final HD117. Docket no. 1308 at 7. The Task Force Plaintiffs contend that "[t]he State's mechanical use of the 50% SSVR standard to claim non-retrogression contorted the redistricting process by making race a predominant factor and led redistricters far afield of traditional redistricting considerations in crafting . . . HD117." *Id.* at 8.

Plaintiffs argue that redistricters also used race, Latino registration and electoral data to swap territory into and out of HD117 to create the district as Latino majority but not likely to elect the Latino candidate of choice; they achieved their 50.1% SSVR goal, yet Latino performance dropped when compared to benchmark. The Task Force argues that Garza's racial statements and

Interiano's method of swapping territory in and out of the district while striving for exactly 50.1% SSVR constitute direct evidence of the use of race as a predominant factor when crafting the district. Id. at 11.

The first step in a *Shaw*-type racial gerrymandering claim analysis is determining whether traditional redistricting principles were subordinated to race. The Court finds that Plaintiffs have made this showing with regard to HD117. Defendants admit, and the evidence is clear, that Defendants believed that maintaining the district above 50% SSVR was essential to avoid retrogression. However, they refused to draw a district that included any more than 50.1% SSVR. Maintaining this particular racial datapoint for the district was the dominant factor used by redistricters in deciding which population to include within or without the district, indicating that racial criteria predominated. Further evidence that race predominated is that Interiano's other explanations for why certain territory was included or excluded were not credible, leaving racial criteria as the primary explanation.

The Court thus considers whether this use of race served a compelling state interest. The Court finds that it did not because, although race was used to reach the 50.1% SSVR target set by redistricters, race was not used to further compliance with the VRA. Rather, redistricters insisted that the district not only have exactly 50.1% SSVR but that it also perform less favorably for Latino voters. Redistricters would not accept Farias's proposed amendment that created an HD117 with 50.1% SSVR but would also maintain Farias's representative-constituent relationship with Whispering Winds and Somerset. Solomons' objections–that it created jagged and awkward

lines and increased the number of split precincts–were pretextual, given that these criteria had not been used to draw the map or reject other proposals, and other districts drawn by Solomons' mapdrawers (such as the HD77/HD78 border and HD41) had more split precincts. Solomons rejected the proposal because maintaining the racial quota *while at the same time ensuring the least possible Hispanic opportunity* was paramount. Accordingly, redistricters lacked a compelling state interest for their use of race.

The Court thus finds that the Task Force Plaintiffs have established a *Shaw*-type racial gerrymandering claim with regard to HD117.

B. HD77 and HD78 in El Paso

The Task Force Plaintiffs point to the fact that in El Paso, Downton used block-level racial data while mapping, and they argue that mapdrawers subordinated traditional redistricting criteria by splitting precincts (Downton split 14 along the HD77/78 boundary). The Task Force Plaintiffs further point to the fact that in places where it employs race-based redistricting, Plan H283 splits precincts, divides communities of interest, and does not protect partisan interests, flaunting traditional redistricting criteria. Docket no. 1308 at 14.

Defendants assert that race did not predominate in the configuration of the El Paso County districts and "the basic configuration of the districts was determined by the El Paso delegation, and the evidence shows that Representative Marquez drew HD77 (including the so-called 'antlers') to maintain its partisan character and to increase her chances of re-election." Docket no. 1310 at 17 (citations omitted). Defendants further contend that

Downton modified the El Paso delegation's proposed districts to increase SSVR in HD78 based on a specific concern raised by Hanna.

The Court finds it to be a close question whether race predominated in the allocation of persons within and without HD78. While the initial configuration of the district was not race-based, there is clear evidence that Marquez modified HD77 and HD78 to assign high-SSVR precincts to her district HD77, and that Downton made further race-based changes to then increase the SSVR in HD78. While the Court finds both uses of race to be unjustified, the Court does not find that race predominated in the drawing of the districts as a whole. Accordingly, the Court finds that the Task Force has failed to establish this *Shaw*-type claim.

IV. One Person, One Vote Claims Based on Population Deviation ("*Larios* Claims")[66]

A. Background

Several plaintiffs allege that specific areas and districts in Plan H283 violate the one person, one vote principle because of systematic underpopulation of majority-Anglo districts combined with systematic overpopulation of majority-Latino districts in urban areas, indicating a discriminatory intent that weakens the

---

[66] As noted above, several Plaintiffs bring these claims under the Equal Protection Clause as violations of the one person, one vote principle. However, they also (as does the United States) incorporate the use of population deviations into their intentional vote dilution claims under § 2 and the Fourteenth Amendment. To limit redundancy, the Court has largely limited the population deviation analysis to the one person, one vote claims except where necessary to the analysis of the intentional vote dilution claims.

strength of votes in the overpopulated districts and systematically disadvantages minority districts. These challenges are brought primarily in reliance on *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *summarily aff'd* 542 U.S. 947 (2004), in which a three-judge panel for the Northern District of Georgia invalidated two Georgia plans with top-to-bottom deviation of less than 10% because they violated the one person, one vote principle. LULAC and the Perez plaintiffs assert similar challenges of this sort, as does MALC. The nature of these claims, and precisely what they challenge, is discussed later.

The court will first describe the general, top-to-bottom deviation in Plan H283 for context and background. Then, the court will summarize the governing legal standards for *Larios*-type one person, one vote claims, which will include a discussion of the legal nature of *what* these claims challenge from a geographic point of view and whether Plaintiffs have standing to bring these claims. Finally, and most importantly, the court will analyze whether the population deviations in Plan H283 are explained by legitimate legislative policies in ways that justify the challenged deviations.

B. Plan-wide deviation in Plan H283

Ideal population for single-member district plans is the total state population divided by the total number of districts. For the Texas House, ideal population of a district based on the 2010 Census is 167,637. HD90 in Tarrant County is the smallest district in Plan H283, with a deviation of -4.90% and population 8,209 below the

ideal.[67] D-109 at 27, 34. HD61 in Parker and Wise Counties is the largest district in the Plan, with a deviation of 5.02% and population 8,417 above the ideal. *Id.* at 27, 32. Therefore, Plan H283 has an overall population deviation of 9.92%.[68] *Id.* at 27.

Martin gave Plan H283 an "F" on good-faith effort to minimize deviation, pointing out that there are fourteen counties with two or more whole districts contained within them, and they account for 93 of the 150 districts. Tr379-81. These 93 districts could have been drawn with zero or minimal population deviations. Tr380. Yet eight of the fourteen counties (accounting for 75 districts) have a total deviation over 3.5% from the county ideal. Tr380, Tr383.

Kousser testified that Plan H283 was "not very compliant" with the one person, one vote principle and that "the population disparities are clearly correlated with partisanship and ethnicity." Tr248-49. He found that population deviations, which were greater in Plan H283 than in the benchmark, were not justified by any legitimate reason and heavily burdened Latinos. Tr249, Tr313. In support of his conclusions, Kousser provided a statistical analysis of the Plan. He stated that if the Legislature had been trying to minimize deviations, a histogram of population deviations would have resembled

---

[67] A district's deviation percent from the ideal is its relative deviation, and is measured by dividing the absolute deviation of the district from the ideal by the ideal population.

[68] "Overall population deviation is the difference in population between the two districts with the greatest disparity. Average population deviation is the average of all districts' deviation from perfect one-person, one-vote allocation." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997). The difference between -4.90% and 5.02% is the total deviation—9.92%.

a normal curve, with the largest number of districts clustered around zero deviations. Tr233. Instead, he noted, it is more U-shaped, with the largest number of districts between four and five percent underpopulated (23 districts) and four and five percent overpopulated (20 districts). Joint Expert Ex. E-2 at 61-66. Plan H100 only had 37 districts with deviations over 4%. *Id.* at 62-63.

Turning to the racial aspects of his conclusions, Kousser stated that Anglo-majority districts are more underpopulated than overpopulated and Latino-majority districts are primarily overpopulated: 34/80 Anglo districts are overpopulated and 46/80 are underpopulated, while 22/37 Latino districts are overpopulated and 15/37 are underpopulated. Tr234; Joint Expert Ex. E-2 at 64-65. Five of these 15 underpopulated Latino districts, however, are contained in El Paso County, a drop-in county that as a whole is underpopulated, which forces all of its districts to be underpopulated. Tr235; Joint Expert Ex. E-2 at 64. Not counting El Paso County, Latino districts are underpopulated at a rate of 31.25% (10/32) while Anglo districts are underpopulated at a rate of 57.5% (46/80); there are more than twice as many overpopulated Latino districts (22) as underpopulated ones (10). Tr235; Joint Expert Ex. E-2 at 64.

In addition, Kousser noted irregularities in urban districts, both Republican and Democrat, but opined that these irregularities were more severe in urban Democrat districts and were worst in urban Democrat Latino districts. Tr235-37. In terms of urban Republican districts, 19 were overpopulated and 15 were underpopulated, with an average deviation of .47%. Joint Expert Ex. E-2 at 66. Urban Democrat districts were overpopulated at approximately the same rate (22

overpopulated, 17 underpopulated), but the deviations were more severe at .94%. *Id.* And, as noted, Urban Democrat Latino districts fared the worst—13 were overpopulated compared to only 6 underpopulated, with an average deviation of 1.17%. *Id.* Almost all districts represented by Latino Democrats were overpopulated. Tr236. Kousser found no pattern to explain the deviations in urban Republican districts, but found a bias towards overpopulation in urban Democrat districts. *Id.* He noted that this pattern demonstrates the Legislature's partisan and racially discriminatory intent. Joint Expert Ex. E-2 at 67.

Dr. Arrington opined that usually the population deviations in a districting plan would be unimodal, with most of the population deviations clustering near the ideal population, but that was not true in Plan H283. US-355 at 7. He added that when use of the County Line Rule is taken into account, there is no statewide, systematic overpopulation of minority districts. TrJ182. In spite of this statewide conclusion, Arrington pointed out specific instances of population deviation in Dallas, Harris, and Hidalgo Counties that he felt exemplified racially discriminatory effects that must have been intentional. US-355 at 10-13; TrJ222.

Defendants' expert, Dr. Alford, provided contrary testimony. He did not think that a unimodal distribution around zero would occur if redistricters started with existing districts and modified them based on new populations, rather than starting from scratch. TrJ1887-88. This, he said, was because mapdrawers were redistributing population along county lines and preserving constituency representational relations. TrJ1888-89. Alford pointed out that both Anglo and

minority districts in Plan H283 have a bimodal pattern, indicating that population equality was balanced against other redistricting interests. TrJ1890.

Alford also analyzed the average deviation of Anglo districts compared with that of minority districts based on CVAP. TrJ1868-71. He found that the average minority district is overpopulated by 232 persons and that the average Anglo district is underpopulated by 124 persons. TrJ1870. Using SSVR, he found that districts with SSVR above 50% were undersized by 242 and districts with SSVR below 50% were oversized by 63. *Id.* In the context of an ideal district size of approximately 168,000, Alford found all of these deviations to be quite minor. TrJ1871.

C. Applicable law of a *Larios* violation of the one person, one vote principle

1. Background

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963). Over time, the Supreme Court and lower courts have spoken extensively on this principle, violations of which are justiciable through the Fourteenth Amendment's Equal Protection Clause. *Baker v. Carr*, 369 U.S. 186, 237 (1962). In short, the theory behind the principle is that "the vote of any citizen [must be] approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). As alleged here, this principle is violated because some districts are underpopulated compared to ideal (giving voters in those districts greater say in electing a representative) and others are

overpopulated compared to ideal (diminishing the value of a vote in these districts). "Simply stated, an individual's right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568.

Reynolds v. Sims set forth the backdrop for one person, one vote claims, holding that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* Recognizing that "[m]athematical exactness or precision is hardly a workable constitutional requirement," *Reynolds* did not require "identical number[s]," but rather "an honest and good faith effort to construct districts, in both houses of [a state's] legislature, as nearly of equal population as is practicable." *Id.* at 577. Otherwise, *Reynolds* provided scant guidance, leaving room for future courts to determine how much deviation is permissible, how to allocate the burden of proof on these questions, and which reasons justify a deviation of a certain size.

Reynolds did, however, provide two points of guidance. First, it described the reasons that might justify some deviation from the ideal as "legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 579. Second, it noted that a higher deviation is permissible in state legislative districts than congressional districts because state legislative districts outnumber congressional districts. *Id.* at 577-78. Because the challenges here are made to Texas House districts,

this pronouncement from *Reynolds* guides the Court's analysis.

2. Burden of proof

i. early cases — the 10% threshold

Moving past *Reynolds*, the Court later stated that "minor deviations from mathematical equality among state legislative districts are insufficient to make out *a prima facie case* of invidious discrimination under the Fourteenth Amendment *so as to require justification by the State.*" *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (emphasis added). Relying on *Reynolds*, the Court recognized the importance of factors aside from strict adherence to a 0% deviation, noting that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Id.* at 749.

Having established that strict population equality would yield to other legitimate reapportionment considerations, the Supreme Court began to provide more specificity concerning what constituted a "minor" deviation. In *White v. Regester*, 412 U.S. 755, 764 (1973), the Court held that plaintiffs challenging a Texas House plan with a total deviation of 9.9% did not "satisf[y] the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause." The Court recognized, however, that it was "[v]ery likely [that] larger differences between districts would not be tolerable without justification 'based on

legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* (quoting *Reynolds*, 377 U.S. at 579). Later, the Supreme Court found that deviations of 16.5% and 19.3% "can hardly be characterized as de minimis" and that they therefore "substantially exceed the 'under 10%' deviations the Court has previously considered to be of *prima facie constitutional validity* only in the context of legislatively enacted apportionments." *Connor v. Finch*, 431 U.S. 407, 418 (1977) (citing *Gaffney*, 412 U.S. 735 (1973) and *Regester*, 412 U.S. 755 (1973)) (emphasis added). Accordingly, the Court in *Finch* stated that "a legislatively crafted apportionment with deviations of this magnitude could be justified only if it were 'based on legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* (quoting *Reynolds*, 377 U.S. at 579).

This line of cases culminated in *Brown v. Thomson*, 462 U.S. 835 (1983). There, the Court explicitly stated the numerical point at which population deviations are treated differently by the one person, one vote principle: "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, *creates a prima facie case of discrimination* and therefore must be justified by the State." *Id.* at 842-43 (emphasis added).

ii. Larios v. Cox

(1) Three-judge panel opinion

In *Larios*, a three-judge panel of the Northern District of Georgia struck down two Georgia plans with

less than 10% deviation because they violated the one person, one vote principle. The court held that

> Georgia's state legislative reapportionment plans plainly violate the one person, one vote principle embodied in the Equal Protection Clause because each deviates from population equality by a total of 9.98% of the ideal district population and there are no legitimate, consistently applied state policies which justify these population deviations. Instead, the plans arbitrarily and discriminatorily dilute and debase the weight of certain citizens' votes by intentionally and systematically underpopulating districts in rural south Georgia and inner-city Atlanta, correspondingly overpopulating the districts in suburban areas surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats.

Larios, 300 F. Supp. 2d at 1322.

Before analyzing the differences for these population deviations, the Court set forth the applicable burdens of proof, with heavy reference to *Brown v. Thomson* and the cases before it. The court stated that "state legislative plans with population deviations of less than 10% may be challenged based on alleged violations of the one person, one vote principle," but the 10% threshold "serves as the determining point for allocating the burden of proof" in such a challenge. *Id.* at 1340 (quoting *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996)). The court focused on the Supreme Court's repeated use of the phrase "prima facie"

in the *Brown* line of cases to indicate that 10% "is not a safe harbor":

> Had the [Supreme Court] intended to foreclose all one person, one vote challenges to plans with population deviations not rising to the 10% level, the Court would undoubtedly have said as much, rather than expressing that such plans are merely "prima facie"—in other words, rebuttably—constitutional. And in this case, because the population deviations in both the House Plan and the 2002 Senate Plan are 9.98%, the ten percent rule applies (albeit barely). In short, the legislative plans are presumptively constitutional, and the burden lies on the plaintiffs to rebut that presumption.

Id. at 1341. The court cited numerous district and circuit court opinions for the proposition that "plans with population deviations of less than 10% . . . are not automatically immune from constitutional attack." *Id.* at 1340 (collecting cases).

Applying this framework, the court found two reasons for the systematic population deviations in Georgia's plans. First, the court noted that these deviations favored rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta. *Id.* at 1327–29. Second, based on circumstantial evidence, the court found that there was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of

Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Id.* at 1329–31.

The court recognized that traditional redistricting principles, when applied in a consistent and nondiscriminatory manner, may justify some level of population deviation. *Id.* at 1331; *see also Karcher v. Daggett*, 462 U.S. 725, 741 (1983) ("The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors."). Yet, in light of the regional favoritism and discriminatory incumbent protection, the court found no such justifications in the record. *Id.* at 1334.

With regard to incumbency protection, the court noted that it can be a "permissible cause of population deviations," but "*only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner." *Id.* (emphasis added). The court recognized Supreme Court precedent indicating that "an interest in avoiding contests between incumbents may justify deviations from exact population equality, not that general protection of incumbents may also justify deviations." *Id.* at 1348 (citing *Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher*, 462 U.S. at 740; *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)). A permissible

use of incumbency protection of this sort, however, was not supported by the record:

> In this case, it is clear that many of the incumbent-protecting population deviations were caused not by the legitimate state interest in avoiding contests between incumbents, but, rather by the more aggressive goal of allowing incumbents to avoid taking on more new constituents than was absolutely necessary to stay within 5% of the ideal district size. The defendant has not attempted to present any evidence that any of the population deviations were truly necessary to avoid pairing two incumbents. In short, in this case, the interest of incumbent protection was not applied in a reasonably consistent and nondiscriminatory way and cannot be used to justify the population deviations.

Id. at 1349.

With regard to the mapdrawers' awareness of population deviations and the potential ramifications of a deviation above 10%, the court noted that the mapdrawers "made no effort to make the districts as nearly of equal population as was practicable. In fact, it is quite apparent on this record that legislators and plan drafters made a concerted effort to contain population deviations to ± 5%, and no further, as they operated on the belief that there was a safe harbor of ± 5%." *Id.* at 1341. Addressing the perception of a 10% deviation safe harbor, the court stated that

> [s]uch use of a 10% population window as a safe harbor may well violate the fundamental one

> person, one vote command of *Reynolds*, requiring that states "make an honest and good faith effort to construct districts . . . as nearly of equal population as practicable" and deviate from this principle only where "divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy." The use of a 10% safe harbor may also conflict with the *Roman* Court's observation that "the constitutionally permissible bounds of discretion in deviating from apportionment according to population" cannot be stated in a uniform mathematical formula, as it assumes that 10% is such a mathematical formula.

Id. (internal citations omitted). Ultimately, however, the court did not answer this question "because the policies the [10% population window] was used to promote in this case were not 'free from any taint of arbitrariness or discrimination'" based on the lack of traditional redistricting principles, disfavoring of suburban areas in favor of rural and inner-city populations, and discriminatory and inconsistent protection of incumbents. *Id.* at 1341–42 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)).

The court did not address whether "partisan advantage alone would have been enough to justify minor population deviations," though it did point out that "the Supreme Court has never sanctioned partisan advantage as a legitimate justification for population deviations." *Id.* at 1351.

(2) Supreme Court affirmance

A per curium Supreme Court summarily affirmed the district court's opinion. *Cox v. Larios*, 542 U.S. 947 (2004).

Justice Stevens wrote a concurrence, joined by Justice Breyer. *Id.* (Stevens, J., concurring). Stevens characterized the appeal as an "invit[ation] . . . to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever." *Id.* at 949. He was satisfied that the Court "properly reject[ed] that invitation" because one person, one vote remained the only clear limitation on partisan gerrymandering, and districting based solely on partisan interests was impermissible. *Id.* at 949–51.

Justice Scalia dissented, and would have set the case for argument because it was not clear "whether a districting plan that *satisfies* [the] 10% criterion may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation." *Id.* at 951 (emphasis original). Scalia characterized the use of "politics as usual" as itself a traditional redistricting criterion, "so long as it does not go too far." *Id.* at 952. He stated that "[i]t is not obvious to me that a legislature goes too far when it stays within the 10% disparity in population our cases allow. To say that it does is to invite allegations of political motivation whenever there is a population disparity, and thus to destroy the 10% safe harbor our cases provide." *Id.*

iii. Harris v. Arizona Independent Redistricting Commission

Harris has been called "the Supreme Court's most recent, and arguably most lucid, pronouncement as to plaintiffs' burdens in one person, one vote cases below the 10% deviation threshold." *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 341 (4th Cir.

2016). There, a group of Arizona voters brought a one person, one vote challenge to a redistricting plan for the state legislature with a maximum population deviation of 8.8%. *Harris*, 136 S. Ct. at 1305–06, 1309. A three-judge panel entered judgment against the plaintiffs after a bench trial, finding that "the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role." *Id.* at 1306.

On appeal, the Supreme Court unanimously affirmed. *Id.* Much of the Court's relatively brief opinion assessed the evidence presented at trial as it related to the plan's deviations and the reasons for them. *Id.* at 1307–09. The Court ultimately affirmed because the district court's conclusion that the deviations were justified by the legitimate factor of attempting to comply with the VRA was "well supported in the record." *Id.* at 1309. In particular, the Court pointed out that the population deviations resulted from a complex and thorough series of attempts at compliance with different requirements of the VRA, "even though partisanship played *some* role." *Id.* at 1308–09 (emphasis added). Beyond this factual conclusion, the Court clearly pronounced the applicable legal standard:

> In sum, in a case like this one, those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" to which we have referred in *Reynolds* and later cases. Given the inherent difficulty of measuring and comparing factors that may legitimately account for small

> deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases.

Id. at 1307.

The voters specifically attempted to invoke *Larios*, arguing that it warranted a different result, but the Supreme Court disagreed:

> In [*Larios*], however, unlike the present case, the district court found that those attacking the plan had shown that it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality among districts. The district court produced many examples showing that population deviation as well as the shape of many districts "did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts." No legitimate purposes could explain them. It is appellants' inability to show that the present plan's deviations and boundary shapes result from the predominance of similarly illegitimate factors that makes [*Larios*] inapposite here. Even assuming, without deciding, that partisanship is an illegitimate redistricting factor, appellants have not carried their burden.

Id. at 1310 (internal citations omitted). While the *Harris* Court's treatment of *Larios* gives a good indication as to the applicable legal standard, it leaves open the question of whether and to what extent partisanship can justify a deviation of less than 10%. *Id.*

iv. Raleigh Wake Citizens Association v. Wake County Board of Elections

In *Raleigh Wake*, a group of voters in North Carolina brought one person, one vote challenges to two redistricting plans for local governmental units that had a total population deviation below 10%. *Raleigh Wake*, 827 F.3d at 338–39. After a bench trial, the district court found that the plans did not violate the one person, one vote principle. *Id.* at 340. The Fourth Circuit reversed, holding that the voters proved their one person, one vote claims. *Id.* at 338.

Raleigh Wake is not binding on this court, but it provides a thorough and insightful discussion of the applicable legal standard and the relationship between *Larios* and *Harris*. In *Raleigh Wake*, the Fourth Circuit applied the standard of review for state legislative plans as stated by the Court in *Harris*—"to succeed on the merits, plaintiffs in one person, one vote cases with population deviations below 10% must show by a preponderance of the evidence that improper considerations predominate in explaining the deviations." *Id.* at 342 (referencing *Larios* and *Harris*). The court contrasted the result of *Harris* with that of *Larios*, but explained these different results as the result of applying different facts to the same legal standard. *Id.* at 341. In *Harris*, the plaintiffs "foundered not because their one person, one vote challenge failed as a matter of law, but because they did not muster the evidence needed to show it to be 'more probable than not that [the] deviation of less than 10% reflect[ed] the predominance of illegitimate reapportionment factors.'" *Id.* (quoting *Harris*) (alteration in original). In *Larios*, on the other hand, "the plaintiffs succeeded in *proving* their one person, one vote

claims." *Id.* (emphasis added). In other words, *Larios* and *Harris* are two sides of the same coin, and a joint reading of these cases clarifies the legal standard to be applied.

v. summary of the burden of proof

The persuasive analysis of *Raleigh Wake*, along with *Harris* and its treatment of *Larios* provide a clear statement of the applicable burden—because Plan H283 contains a top-to-bottom deviation of less than 10%, Plaintiffs must show that it is more probable than not that the deviations reflect the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" identified by *Reynolds* and later cases. *Harris*, 136 S. Ct. at 1307. Population deviations of less than 10% are not within a safe harbor and may still be challenged. *See Moore v. Itawamba Cty., Miss.*, 431 F.3d 257, 259 (5th Cir. 2005) ("[A] deviation less than ten percent is not a safe harbor, barring any claim of discrimination.").

3. Geographical nature of a *Larios* one person, one vote claim

i. applicable law

Although Plaintiffs originally asserted primarily statewide claims in their pleadings, as the case developed, they challenged population deviations in discrete geographic areas. They briefed these challenges to population deviations as both statewide claims and claims made in specific geographic areas. In their Post-Trial Brief, Defendants raise, but do not develop, a discussion-worthy point about the nature of a *Larios* one person, one vote claim by implying that such claims do not exist at a localized level, and can be made only against a plan as a whole. *See* Docket no. 1272 at 147 ("Even if *Larios* could

support a county-specific one-person-one-vote claim . . .''). This point raises a valid distinction between what was challenged in *Larios* and what is challenged here. In *Larios*, the plaintiffs challenged the plan *as a whole* by pointing out broad, statewide deficiencies and systematic deviations that disadvantaged suburban counties surrounding Atlanta. Here, the claims are geographically more dispersed and localized, with Plaintiffs pointing out deviations in specific areas across the state. Thus, the Court must address the conceptual question of whether a *Larios* claim can be made against specific districts in a plan that has a top-to-bottom deviation below 10%.

On this point, the court finds guidance in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265-68 (2015). There, two groups brought racial gerrymandering claims against an Alabama redistricting plan. *Id.* at 1263. Following a bench trial, a three-judge panel rejected these claims for several reasons. *Id.* at 1264. The court placed the challenges into two categories: (1) claims that the plans *as a whole* constituted racial gerrymanders, and (2) claims that the state racially gerrymandered four specific districts. *Id.* It then proceeded to dispose of these claims by "referr[ing] to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole*." *Id.* at 1265 (emphasis original).

The Supreme Court disagreed with this characterization of a racial gerrymandering claim as a statewide attack on a plan as a whole. Instead, the Court held, such a claim "applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a state considered as an undifferentiated 'whole.'" *Id.*

The Supreme Court's reasoning for this conclusion was two-fold. First, it noted that it has "consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Id.* (emphasis original). Second, and consistent with its first point, the Court recognized that the nature of the harm arising from a racial gerrymandering claim is individual and personal:

> [These harms] include being "personally . . . subjected to [a] racial classification," as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group. They directly threaten a voter who lives in the district attacked. But they do not so keenly threaten a voter who lives elsewhere in the State.

Id. (internal citations omitted).

In light of its view of these claims as district-specific challenges, the Supreme Court criticized the panel's repeated characterization of the claims as attacks on the plan "as a whole." It noted that, as an evidentiary matter, statewide evidence may be used to "prove racial gerrymandering *in a particular district*," but this was different from a statewide challenge to the entire plan. *Id.* (emphasis added). Building off this, the Court next clarified that "voters might make the claim that *every* individual district in a State suffers from racial gerrymandering," but that this was not the same as "a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*." *Id* at 1265-66 (emphasis original). Ultimately, the Supreme Court remanded for further findings with respect to the individually

challenged districts because "[a] showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts . . . would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama's majority-minority districts primarily at issue here." *Id.* at 1266 (emphasis in original).

The obvious distinction between *Alabama LBC* and the present case is that *Alabama LBC* dealt with a racial gerrymandering claim. In light of the reasoning in *Alabama LBC*, this is a meaningful distinction—racial gerrymandering claims are consistently described and applied on a district-by-district level, as the Supreme Court's language in prior cases indicates.[69] Recognizing that the Court in *Alabama LBC* relied heavily on its prior linguistic formulations of racial gerrymandering claims in determining their geographic scope, this Court will conduct a similar analysis with respect to the language that describes one person, one vote challenges based on population deviations under 10%.

Early (pre-*Larios*) cases involving one person, one vote claims speak of challenges to "schemes" and to "plans," not to individual districts. *See, e.g., Reynolds*, 377

---

[69] The Court quoted language from several seminal racial gerrymandering cases for this proposition. *E.g., Shaw v. Reno*, 509 U.S. 630, 649 (1993) (racial gerrymandering violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Bush v. Vera*, 517 U.S. 952, 965 (1996) (principal opinion) ("[Courts] must scrutinize *each challenged district* . . . " (emphasis added)); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*." (emphasis added)).

U.S. at 560, 586 ("[A]ttacks on *state legislative apportionment schemes*, such as that involved in the instant cases, are principally based on the Equal Protection Clause . . . Since, under neither the existing apportionment provisions nor either *of the proposed plans* was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that *all three of these schemes* were constitutionally invalid." (emphasis added)); *Gaffney*, 412 U.S. at 751-52 ("We must, therefore, respond to appellees' claims in this case that even if acceptable populationwise, *the Apportionment Board's plan* was invidiously discriminatory because a 'political fairness principle' was followed in making up the districts in both the House and Senate." (emphasis added)); *Regester*, 412 U.S. at 763-64 (reversing a three-judge district court judgment that "*the apportionment plan* for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote.'" (emphasis added)).[70]

Larios itself squarely fits this mold. *Larios*, 300 F. Supp. 2d at 1357 ("Judgment is entered in favor of the plaintiffs and against the defendant on Count I (Violation of Right to Equal Protection of the Laws), insofar as *the plaintiffs have alleged that Georgia's state legislative reapportionment plans* violate the one person, one vote principle." (emphasis added)). Even cases since *Larios*

---

[70] *Regester* also upheld the district court's conclusion that multi-member districts in two specific counties were unconstitutional. *Regester*, 412 U.S. at 765-70. These determinations, however, were not made in the context of a one person, one vote challenge to population deviation, but rather through a different legal theory entirely. *See id.*

have allowed similar one person, one vote claims made on the basis of top-to-bottom deviation to proceed against a plan *as a whole*. *See Harris*, 136 S. Ct. at 1305 ("Appellants, a group of Arizona voters, challenge *a redistricting plan* for the State's legislature on the ground that *the plan's districts* are insufficiently equal in population . . . We consequently affirm a 3–judge Federal District Court decision upholding *the plan*." (emphasis added)).

On the other hand, one person, one vote claims against specific geographical areas have also been brought. In *Connor v. Finch*, one group of appellants challenged Mississippi's court-ordered Senate Plan "as a whole" but did not make a "blanket challenge to the entire House Plan," instead pointing only to several specific districts. *Finch*, 431 U.S. at 421 n.19. Nevertheless, the Court gave these appellants the benefit of the doubt, scrutinizing the entire House Plan even though only several specific districts were challenged:

> In the context of a court-ordered plan that results in the sort of systemic violation revealed by the figures in this record, *it is hardly appropriate to confine our scrutiny to particularly egregious, but localized examples of violations specifically relied on by the parties.* And even if the constitutional validity of the entire court-ordered House plan could not appropriately be viewed as an issue implicitly raised by the parties, this Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they

> seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. (emphasis added) (internal citations omitted). Though the *Finch* Court was not entirely clear on its actions, it appears to have converted a claim against *specific geographic regions* within a plan into a claim *against the plan as a whole* due to the widespread impropriety of the deviations and public impact, even though the plaintiffs did not bring their claims as such.

This question of local-versus-statewide was even more acute in *Brown v. Thomson*, in which the Court ultimately refused to invalidate a Wyoming Plan with an 89% top-to-bottom deviation because only one specific geographic feature of the Plan was challenged. *Brown*, 462 U.S. at 846-48. The Court focused on one narrow issue, as framed by the district court in reliance on expert testimony—whether "the 'dilution' of the plaintiffs' votes is de minimis when Niobrara County has its own representative" despite being underpopulated by over 60%. *Id.* at 841. The Court answered this narrow question in the negative because the deviation in Niobrara County was entirely the result of consistently applied, nondiscriminatory state policies. *Id.* at 844-46.

Despite this holding, the 5-4 Court had to address the elephant in the room—the plan's overall deviation of 89%. The Court explained that the question was not before it because the plaintiffs did not challenge the entirety of the Wyoming Plan:

> [W]e are not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative

> districts. Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County. The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.

Id. at 846 (footnotes omitted).

Justice O'Connor joined the majority, but wrote a separate concurrence, expressing "the gravest doubts" about the constitutionality of the statewide legislative plan, but agreeing that the relevant geographic focus was Niobrara County rather than the plan as a whole, based on the plaintiffs' characterization of their claims. *Id.* at 849-50 (O'Connor, J., concurring) (joined by Stevens, J.).

Justice Brennan, joined by three others, dissented. *Id.* at 850-61 (Brennan, J., dissenting). The dissenting justices would have reached the question of the entire plan's constitutionality under the one person, one vote principle in light of its 89% deviation. *Id.* at 853-56 (Brennan, J., dissenting). Though the dissent does not squarely explain why it would do so even though the plaintiffs did not bring this claim, it points out the unlikelihood that "any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature . . . [A]t least plaintiffs henceforth will know better than to exercise moderation

or restraint in mounting constitutional attacks on state apportionment statutes, lest they forfeit their small claim by omitting to assert a big one." *Id.* at 851 (Brennan, J., dissenting). From the dissent's point of view, the practical import of the *Brown* holding is limited because plaintiffs in future cases will bring appropriately broad claims.

The split between the majority and dissent in *Brown* explains the geographic scope of a one person, one vote claim—it is whatever the plaintiff makes it. These challenges can be plan-wide, location-specific, or both. Were it otherwise, there would be no cause for disagreement among the justices in *Brown* because this disagreement is over whether the plaintiff had in fact brought a statewide challenge or a limited, localized challenge. The majority found that the plaintiff only challenged one specific county and its district, while the dissent nevertheless felt that the plan as a whole was subject to scrutiny in that case. In either event, implicit in this disagreement is that both a state-wide challenge and a localized challenge are legally cognizable theories under the one person, one vote principle, and that it is up to the plaintiff to choose his challenge. Though it appears that the method of choice for plaintiffs in these cases is to challenge a plan as a whole, *e.g.*, *Larios*, 300 F. Supp. 2d 1320, this trend of strategic choices is simply consistent with Justice Brennan's prediction that plaintiffs in such cases would bring both narrow and broad claims.

The second portion of the Court's reasoning in *Alabama LBC* was that racial gerrymandering claims were properly characterized as district-by-district claims because the "harms" that arise from these violations are "personal" in that a voter in a racially gerrymandered district is personally subjected to a racial classification, is

personally represented by a legislator who believes he is only there to represent members of a racial group, and is personally affected so long as he lives in the challenged district. This aspect of the Court's reasoning is both similar to and distinct from a one person, one vote challenge.

By their very nature, a plan with population deviations will overvalue voters in underpopulated districts and undervalue voters in overpopulated districts. The voter in the overpopulated district will be personally affected by overpopulation because his vote will matter less, whereas another voter in another part of the state will not necessarily suffer this same harm unless his district is also overpopulated. Thus, like a voter in a racially gerrymandered district, a voter in an overpopulated district suffers a harm that is personal to him and is not necessarily experienced by a voter in another part of the state. This explains why a one person, one vote challenge, like a racial gerrymandering claim, can be brought on a district-by-district basis.

On the other hand, the harms that result from population deviation can be broader. In cases like *Larios* and *Harris*, the fact that the top-to-bottom deviation *in a plan as a whole* is less than 10% determines the burden of proof for analyzing compliance with the one person, one vote principle. A different burden ("a prima facie case of discrimination") applies in cases with a statewide deviation of greater than 10% *in a plan as a whole*. *Brown*, 462 U.S. at 842-43 (citing *Swann v. Adams*, 385 U.S. 440, 444 (1967) (discussing plan-wide deviations of 30% and 40%)). Because the law treats *plans* differently based on the amount of overall plan-wide deviation, these

challenges can be and frequently are made to a plan as a whole.

In sum, if a plaintiff characterizes his one person, one vote claim as a challenge to an entire plan with an overall deviation of less than 10%, the geographic nature of that claim is plan-wide. *See, e.g., Harris*, 136 S. Ct. at 1305; *Larios*, 300 F. Supp. 2d at 1357. On the other hand, if a plaintiff characterizes his one person, one vote claim as a challenge to a specific piece within an entire plan with an overall deviation of less than 10%, the geographic nature of that claim is limited to that specific piece of the plan. *See, e.g., Brown*, 462 U.S. at 846. Both are valid legal theories for challenging a plan, and both claims can be made together.

ii. Plaintiffs' claims

Because the geographical nature of Plaintiffs' claims depends on how they have presented these claims, the Court must assess the pleadings and briefing to determine precisely what is being challenged. This is no easy task.

LULAC and the Perez Plaintiffs assert challenges of this sort, even though Defendants urge that the Perez Plaintiffs have not brought such a claim. *See* Docket no. 1272 at 3 n.5, 49 n.23. The Perez Plaintiffs' complaint is not a model of clarity,[71] but it, along with their other

---

[71] LULAC joined the Perez Plaintiffs in their live complaint, which states "Plaintiff LULAC joins this complaint for the limited purpose of challenging the redistricting of the Texas House of Representatives as set forth in paragraph 32 below." Docket no. 960 at 2 (Perez Plaintiffs' and LULAC's Sixth Amended Complaint). This complaint, however, ends at paragraph 28, in which Plaintiffs assert what the court views as a *Larios*-type challenge to the Texas House plan. *See id.* Notably, however, the Perez Plaintiffs' previous

briefing and the issues presented at trial, sufficiently states that they are making these challenges.

Precisely *what* these Plaintiffs are alleging, however, is a moving target. Overlooking the apparent error in the Perez Plaintiffs' and LULAC's Joint Sixth Amended Complaint, the Court will look to this live pleading and assume that these parties meant to join in the same claims set forth therein. Under this reading, the Perez Plaintiffs and LULAC potentially challenge the following districts in Plan H283 as violating one person, one vote principles: 102, 105, 107, 113 (Dallas County); 132, 135 (Harris County); 26 (Fort Bend County); 93, 96 (Tarrant County); 54 (Bell County); and 56 (McLennan County). Docket no. 960 ¶¶ 12, 28. The Complaint seeks a declaration that "the existing plans for election of the Texas House of Representatives . . . [are] in violation of . . .the 14th Amendment," which indicates that the Perez plaintiffs and LULAC also challenge Plan H283 as a whole. *Id.* at 6. However, because they also bring intentional vote dilution claims under the Fourteenth Amendment, it is difficult to discern whether all of these areas involve alleged one person, one vote violations.

The complaint is only a starting point. The Perez Plaintiffs have identified other geographic areas throughout their briefing, though they do not always point to specific districts. In addition to the above-listed districts, the Perez Plaintiffs point out additional districts

---

complaint, which is not joined by LULAC, lists its *Larios*-type claims in paragraph 32. Docket no. 898 at 8 (Perez plaintiffs' Fifth Amended Complaint). It appears that the Perez Plaintiffs made an error in explaining which claims LULAC joins, and intended to state in their Sixth Amended Complaint that LULAC joins the *Larios* claims in paragraph 28.

when discussing potential issues with population deviation. For example, in their Post-Trial Brief, they add districts 137, 144, and 149 in Harris County. Docket no. 1303 at 1. In addition, the Perez Plaintiffs bring up certain counties in their briefs but it is unclear whether they rely upon the Fourteenth Amendment for the intentional vote dilution or one person, one vote claims, or both. *E.g.*, Docket no. 1303 at 5 (discussing McLennan County). In their briefing, it is also unclear whether they are challenging specific geographic areas (whether certain districts, certain counties, or certain unnamed districts in certain named counties), whether they are pointing to these problem areas as evidence of a plan-wide claim, or both.

For guidance, the Court looks to the Perez Plaintiffs' Proposed Conclusions of Law. Docket no. 1265. There, the second conclusion of law lists the following districts as violating the Fourteenth Amendment, though again it is unclear whether this is intended to be limited to their intentional vote dilution claims: HDs 101, 102, 103, 104, 105 (Dallas County); HDs 132, 137, 145, 148, 149 (Harris County); HD93 (Tarrant County); HD117 (Bexar County); HD41 (Hidalgo County); "McLennan County District 57 in the Benchmark Plan" (which is associated with HD56); HD 54 (Bell County); and HD26 (Fort Bend County). *Id.* In addition, the third proposed conclusion of law states, "HB 283 has unconstitutionally excessive population deviation among the House districts in Dallas, Harris and Tarrant Counties. These deviations are the result of gerrymandering along racial ethnic and partisan lines, in violation of the principles established in *Cox v. Larios*, 542 US 947 (2004). Accordingly, the redistricting plans for these counties are void." *Id.*

Between the districts identified in the Sixth Amended Complaint and these proposed findings of fact and conclusions of law, the Court construes this to be the scope of the Perez Plaintiffs' claims. At their broadest, the Perez Plaintiffs challenge Plan H283, as a whole, along with the entire counties of Dallas, Harris, and Tarrant. Construing the claims as such reconciles the main differences between the identified districts in the Complaint and conclusions of law, which are mostly in Dallas and Harris Counties. Finally, they challenge the identified districts in Hidalgo, Bell, and Fort Bend Counties, as well as all districts in Dallas, Harris, and Tarrant Counties individually.

Importantly, and more generally, the Perez Plaintiffs *and LULAC* allege *Larios* violations "[p]rimarily in the multi-member urban counties," but make clear that they are not alleging violations "mainly in the ex-urban and rural areas of the state" where "there may be a plausible explanation for the population deviations" in the County Line Rule. Docket no. 738 at 21-22. They state that "the entire House plan does not have to be redrawn." *Id.* The Court construes these more generalized claims as an adoption by LULAC of the claims that the Perez Plaintiffs have brought to specific districts and counties in the "multi-member urban counties" throughout the state. This would encompass the aforementioned counties and districts, along with Nueces County.

MALC asserts similar claims. *See* Docket no. 734 at 8–13. Broadly, MALC's claim is that Latino-majority districts within whole counties were overpopulated. *Id.* Aside from the generalized claim, MALC's briefing identifies several particularly problematic areas in Harris County (HDs 145, 147, 149) and Hidalgo County (HDs 30,

31, 36, 39, 41). *Id.* It appears that MALC also asserts a claim against Plan H283 as a whole. Docket no. 1275 at 45–47 (MALC's Proposed Conclusions of Law). *Id.*

D. Standing

Before the Court turns to the merits of the Plaintiffs' claims, it must consider whether they have standing on the *Larios*-type one person, one vote claims that they assert. The elements of standing are well-established:

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citations omitted) (most alterations original). "An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

The geographic nature of the parties' claims makes a complex, party-by-party standing inquiry unnecessary because as discussed above, LULAC asserts the broadest claims with respect to individual districts, and LULAC has members in each of the challenged districts identified above.[72] In order to establish its standing, LULAC recently filed a motion for leave to supplement the record with a declaration from its Texas State Director, Elia Mendoza. Docket no. 1342. In the declaration, Mendoza states that "there are multiple members of LULAC who are eligible voters in each of the . . . State Legislative Districts" in Dallas County, Tarrant County, Harris County, Bell County (including specifically the city of Killeen), the "Lower Rio Grande Valley Counties" (which would encompass Hidalgo County), and Fort Bend

---

[72] Again, we find guidance from *Alabama LBC*. Aside from addressing the geographic nature of the claims brought, the Supreme Court reviewed the district court panel's opinion on standing. *Alabama LBC*, 135 S. Ct at 1268. The district court *sua sponte* dismissed claims brought by the Alabama Democratic Conference—one of the two plaintiffs—because it found that the Conference did not prove that it had members in the challenged districts. *Id.* at 1268–70. The Supreme Court remanded, stating that "elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte* [and dismissing], give the conference an opportunity to provide evidence of member residence" by providing a membership list. *Id.* What necessitated the standing analysis in the first place, however, was that the Conference brought a broader list of claims than the other plaintiff, the Alabama Legislative Black Caucus, which had adequately proven its standing but brought a narrower list of claims. *Id.* at 1264. Here, LULAC is both the party with the broadest standing and the party bringing the broadest array of claims. Therefore, unlike in *Alabama LBC*, the standing inquiry is less important, and the Court rests its analysis of the merits on the standing of LULAC, which covers all of the *Lavios* claims in the lawsuit.

County, among others. Docket no. 1342-1 at 3. In addition, LULAC identifies specific members by name in HD149 (Harris County), HD54 (a challenged Bell County district), HD34 (a challenged Nueces County district), and HD36 (a challenged Hidalgo County district). *Id.*

Defendants oppose LULAC's request for leave to supplement the record with Mendoza's declaration. Docket no. 1343. They argue that LULAC does not justify its failure to introduce this evidence sooner, and that supplementing the record now is prejudicial because they never had an opportunity to challenge the declaration. *Id.* at 3-4, 6-7. In addition, Defendants point to a stipulation that they made with LULAC to end a previous discovery dispute between the parties. *Id.* at 4 (citing docket nos. 955, 956, 975, 1000). This dispute arose from LULAC's alleged failure to supplement its initial disclosures and respond to certain interrogatories and requests for production. *See* docket no. 955 at 2. The Court granted Defendants' initial motion to compel. Docket nos. 955, 956. After LULAC allegedly failed to comply with that order, Defendants filed two motions for sanctions. Docket nos. 975, 1000.[73] By their motion for sanctions, Defendants sought to prevent LULAC from introducing evidence and witnesses at trial relating to the merits of its claims. *See* docket no. 1000 at 3-5. Ultimately, the parties resolved this dispute through a stipulation, which stated:

> *In connection with Defendants* [sic] *Second Motion for Sanctions Against the LULAC Plaintiffs*, [Defendants] and [the LULAC

---

[73] Defendants withdrew the initial motion for sanctions, docket nos. 975, 977, and later filed the second motion, which is similar to the first and seeks the same relief as the first, docket no. 1000.

> Plaintiffs], hereby agree as follows: 1. LULAC's only witness at the 2014 trial will be their disclosed expert George Korbel. LULAC agrees that it shall not call any other witnesses at the 2014 trial. 2. At trial, LULAC will only offer exhibits that were: a. previously offered by LULAC in the 2011 Section 2 trial of this matter; or b. provided to Defendants on May 24, 2014, and at the deposition of George Korbel scheduled for May 27, 2014.

Docket no. 1002 (emphasis added).

LULAC's motion for leave to supplement the record is granted. As an initial matter, the Court points out that the prior discovery dispute centered around information unrelated to LULAC's standing or the residency of its members, and the resulting stipulation between Defendants and LULAC was made "[i]n connection with" that dispute. As Defendants' motion for sanctions made clear, Defendants were only seeking LULAC's contentions and proposed testimony related to the merits of its case. *See* docket no. 1000 at 3-5.[74] The language of

---

[74] Without rehashing the entirety of the relief that Defendants sought by their motion for sanctions, the Court recounts two illustrative examples:

> The State Defendants request an order prohibiting the LULAC plaintiffs from presenting evidence, testimony or otherwise supporting their claims on the following issues, is appropriate at this time: [sic] 1. LULAC's contention that the Texas Legislature engaged in intentional discrimination against minorities in passing the 2011 Congressional Plan (C185) and the 2011 Texas House of Representatives Plan (Plan H283). (RFP 2). . . . 17. Testimony by unknown individuals involved in preparing plans of apportionment, and testimony about such plans. (2011 Disclosures at ¶ 5).

Docket no. 1000 at 3, 5.

the discovery requests at issue and a letter from Defendants' attorneys to LULAC's attorney likewise show that this discovery dispute was never about evidence, facts, or information relating to LULAC's standing. *See generally* docket nos. 975-5, 975-6, 975-7, 975-8, 975-9. Thus, because LULAC's stipulation was made "in connection with" a discovery dispute surrounding the merits of LULAC's contentions, that stipulation does not extend to the present request for leave, which is limited to only evidence on LULAC's standing.

Beyond this, "[i]n deciding whether to reopen evidence, a court should weigh the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party." *Aransas Project v. Shaw*, 775 F.3d 641, 655 (5th Cir. 2014) (internal quotations omitted). Courts are permitted "wide discretion" in exercising their powers over the presentation of evidence, which includes the reopening of evidence. *In re Perry*, 345 F.3d 303, 309–10 (5th Cir. 2003). LULAC considers its failure to present the declaration sooner as a simple technicality, docket no. 1342 at 2, while Defendants complain that they will be severely prejudiced by being unable to challenge the declaration, docket no. 1343 at 6-7. Neither party addresses the importance and probative value of the declaration, but both are extremely high and weigh heavily in favor of granting leave. Without the declaration, LULAC's standing will be entirely unclear, and such a deficiency will have come to light only long after the end of trial and after the Court has expended vast resources in analyzing the parties' contentions on the merits. Similarly, the probative value

of LULAC's declaration is high, as the Supreme Court has recognized in similar circumstances that there is "no reason to believe that [an association plaintiff in redistricting litigation] would have been unable to provide a list of members . . . had it been asked." *Alabama LBC*, 135 S. Ct at 1269–70.[75] Further supporting Plaintiffs' request for leave is *Alabama LBC*, which guides courts to recognize "elementary principles of procedural fairness" and consider allowing presentation of a membership list before dismissing redistricting claims for a lack of standing. *Id.*

Consistency also dictates this result. In its previous order addressing the Plaintiffs' challenges to the congressional maps, the Court addressed a similar request from the Task Force for leave to file under seal a list of its members. Docket no. 1339 at 100-01 (granting docket no. 1314). The Task Force and Defendants presented similar arguments concerning the excuse for the failure to present standing evidence sooner and the prejudice to Defendants in granting the motion. Ultimately, the Court granted the Task Force's motion:

> The Court initially found that the Task Force had satisfied the pleading standard for associational standing, and neither the Court nor Defendants again raised the issue. Given the undisputed existence of standing with regard to CD6 and the strong likelihood that an individual member of the

---

[75] To be clear, this is not to say, as LULAC requests, that the Court takes judicial notice of LULAC's membership list. Instead, the Court simply recognizes that the organization's declaration of the residences of its own members is highly probative of where those members reside.

> Task Force's member organizations would have standing to challenge CD26, the Task Force was not dilatory in seeking to admit evidence, especially given that the *Shaw* claims have not been a primary focus of the litigation, the issue had not been pressed by Defendants or the Court, and the Task Force had First Amendment and privacy concerns about releasing member information. Defendants are not surprised by this claim and were not so concerned about the issue to have raised it again via motion for summary judgment or otherwise. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (allowing joinder of parties on appeal to address lack of standing and noting that "[t]o . . . require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration").

Docket no. 1339. This logic holds true here. The *Larios* claims at issue in this standing analysis have not been the primary focus of the litigation up to this point. Prejudice to Defendants is mitigated by the fact that they were on notice of the declaration (which LULAC originally filed in April 2015 as an exhibit to its briefing on *Alabama LBC*, docket no. 1302-1), and did not seek summary judgment or otherwise press the standing issue. Accordingly, LULAC's motion for leave is granted.

Having granted LULAC's motion for leave to supplement the record with Mendoza's declaration that sets forth the residences of LULAC's members, the Court finds that LULAC has standing to bring *Larios* one person, one vote claims because it has individual members in each of the challenged areas. Because no other plaintiff asserts a *Larios* claim in an area where LULAC does not,

whether other plaintiffs have standing is irrelevant, and the Court must analyze the merits of these claims regardless. *See supra* footnote 71 and accompanying text.

E. Analysis of the merits of the population deviation claims

"[T]he proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). The *Roman* Court's pronouncement that minor deviations (below 10%) can only be justified by "certain factors that are free from any taint of arbitrariness or discrimination" is often quoted, and provides a high-level guide for what types of factors plaintiffs may use as evidence to invalidate a plan with a deviation below 10%. *See, e.g.*, *Larios*, 300 F. Supp. 2d at 1340; *Gaffney*, 412 U.S. at 777 n.4; *Finch*, 431 U.S. at 415; *Brown*, 462 U.S. at 843; *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1090 (D. Ariz. 2014), *aff'd*, 136 S. Ct. 1301 (2016).

The Supreme Court has identified several specific traditional redistricting criteria that, when applied in a nondiscriminatory manner, will justify deviations. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). This list includes "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* A *Larios*-type one person, one vote challenge

necessarily focuses on the reasons behind the population deviations because of the applicable burden of proof—the plaintiffs must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" identified by *Reynolds* and later cases. *See Harris*, 136 S. Ct. at 1307.

In general, the parties contest the legitimacy of the reasons behind the deviations, to the extent that there are reasons given. Looking to these reasons, Defendants have not consistently argued that making districts compact and preserving the cores of prior districts created the deviations, even though these are permissible reasons for population deviations under *Karcher*. In addition, Defendants point to further reasons that are not identified in *Karcher* but that nonetheless warrant full discussion. The court now turns to these reasons.

1. Mistaken belief in a 10% safe harbor

The mapdrawers' most common explanation for the deviations is that they believed that under *Larios*, a map with a deviation under 10% could not be challenged. Tr994 (Downton); Tr1473-74 (Interiano). Mapdrawers believed that they would not have to proffer any further explanation. *Id.* Because of this belief, population deviations were intentionally not minimized beyond 10%, and were not explained or justified on the legislative record during the session. Tr1494 (Interiano): Downton 8-12-11 depo. (Joint Ex. J-62) at 14-15.

Mapdrawers were aware of the one person, one vote principle and of *Larios v. Cox*. Interiano 8-26-11 depo. (Joint Ex. J-61) at 11-12. Hanna stated at a March 2011 HRC hearing that a 10% deviation is allowed "without

justification." D-590 at 40. He cautioned, however, that *Larios* might mean that "the old ten percent rule, which was a safe harbor, may not be any more." *Id.* Hanna went further: "[i]f all [of a] certain kind of district are drawing small, then we start to run into the sort of issues that they [had] in [*Larios v.*] *Cox*. Or if all the districts are drawing big, we start to run into that question. That's not fully developed jurisprudence yet but that starts to get me a little bit concerned." *Id.* at 45. Hanna advised that, to avoid *Larios* problems, the Legislature should "[e]nsure that all deviations are justified by a legitimate, consistently applied policy such as the preservation of county lines" and should "[m]ake sure that deviations in a plan with a total deviation of less than 10 percent do not consistently advantage or disadvantage one or more regions, racial or ethnic groups, or political parties." Perez-132 at 1. At the April 15 HRC meeting, Rep. Madden and Luis Figueroa of MALDEF also discussed *Larios*, and Rep. Madden noted that the case "indicated that you had to pay attention to deviations from the standard so that you didn't have one group as under and other groups as over." D-595 at 57.

The TLC's publication, *State and Federal Law Governing Redistricting in Texas* included similar admonitions:

> [I]t is reasonably clear that, so long as the total deviation range of a state legislative plan remains under 10 percent, the state is not required to strive for a more exacting level of population equality. Within this range, the state is relatively free to use population deviation for any rational purpose. However, as discussed . . . , a discriminatory scheme of population deviation may be invalid for

> other reasons, even if the range of deviation is less than 10 percent. . . . Even if a legislative plan has an overall range of population deviation less than 10 percent, a pattern of population deviation within that range to further invidious intentional discrimination or that inadvertently results in the systematic underrepresentation of a racial or ethnic group may be held invalid on other grounds. . . . To minimize the chance of a successful challenge under the somewhat amorphous *Larios* standard, mapmakers may want to consider, in a legislative redistricting plan with an overall deviation of less than 10 percent, avoiding deviations that consistently advantage or disadvantage a particular political, racial, or ethnic group or region of the state.

US-357 at 36-37, 39.

In spite of these warnings, mapdrawers assumed they could have a 10% deviation *without justification*, and drew the map on that assumption. Yet this assumption is not only wrong in light of the governing law, but also in light of the record—mapdrawers were repeatedly warned that under *Larios*, plans with deviations below 10% were *not* immune from challenge.

More importantly, this mistake, even if it explains the existence of the deviations, is not a justification for the deviations. It may be true in part that mapdrawers did not pay attention to deviations (so long as they were under 10%) because they mistakenly believed that they had a

10% safe harbor.[76] But the free-wheeling use of deviations up to 10% without furthering any other constitutionally acceptable redistricting criteria is not itself a constitutionally acceptable redistricting criterion. In *Reynolds*, the Supreme Court stated that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible." *Reynolds*, 377 U.S. at 579.

This pronouncement set up a simple framework—deviations may exist, but they must be justified by the right reasons. Cases beyond *Reynolds* have added the 10% threshold to this framework as the leeway for mapdrawers to further *other* legitimate criteria; the threshold itself is not a legitimate criterion. To hold otherwise would overlook the Supreme Court's language in *Roman* describing which criteria may justify minor deviations below 10%: "[F]actors that are free from any taint of *arbitrariness* or discrimination." *Roman*, 377 U.S. at 710 (emphasis added).

Still, though the mistaken belief in a 10% safe harbor does not justify a deviation, the burden of proof is on Plaintiffs to show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" identified by *Reynolds* and later cases. *Harris*, 136 S. Ct. at 1307. Defendants argue that Plaintiffs have not carried this burden because the

---

[76] As discussed, this factual assertion is not credible—mapdrawers were repeatedly warned that the Plan might be scrutinized even if its overall deviation was below 10%.

mapdrawers' mistaken belief was accompanied by the occasional use of other traditional redistricting criteria and was not accompanied by the use of any illegitimate factors. On this point, Defendants argue that *Larios* should yield to *Rodriguez* v. *Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004). There, the court found "that an express objective of staying within a ten-percent deviation *while pursuing other legitimate goals* provides no support to the plaintiffs' claim of invidious or arbitrary discrimination or of bad faith." *Id.* at 367 (emphasis added). The court ultimately granted summary judgment against the plaintiffs' one person, one vote challenge to a New York state plan with an overall deviation of 9.78%. *Id.* at 365, 370-71.

Pataki and *Larios* are not inconsistent, though they are factually distinct. On the impermissible and inconsistent use of incumbency protection, the *Pataki* court noted that the New York plan, unlike the Georgia plan in *Larios*, "reflect[ed] a legitimate effort to avoid incumbent pairs." *Id.* at 367-68 n.23. As for favoritism of some geographic areas of a state at the expense of others, the New York plan "appl[ied] the accepted principle of maintaining the core of districts" in both the allegedly favored and disfavored districts. *Id.* at 370 n.27.

Importantly, the *Pataki* court identified "many permissible redistricting considerations" that influenced the mapdrawers: "[The State Legislative Task Force on Demographic Research and Reapportionment] was interested in contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of *Brown*." *Id.* at 367-68. In

Larios, on the other hand, no similar considerations were at work. *Larios*, 300 F. Supp. 2d at 1331. Though Georgia argued that its use of incumbency protection could justify the deviation, the court found that the use of incumbency protection was inconsistent and discriminatory. *Id.* The state did not attempt to identify any other "state polic[y] that, when applied in a consistent and nondiscriminatory manner [could] justify some population deviation." *Id.* (citing *Karcher* 462 U.S. 725 (1983)).[77]

Pataki is similar to the present case in one main way—in both cases, mapdrawers knew that the legal implications of their plans would change when overall population deviation exceeded 10%. This similarity alone, however, is not in any way outcome determinative, just as this fact alone was not dispositive in *Pataki*. Though the *Pataki* court recognized that "[n]o invidious purpose can be inferred from such conduct *alone*," the court there found that New York's mapdrawers were mindful of the 10% threshold "*while pursuing other legitimate goals.*" *Pataki*, 308 F. Supp. 2d at 367 (emphasis added). As explained in the court's contrast to *Larios*, the New York mapdrawers' awareness of the threshold was accompanied by several other traditional, neutrally applied redistricting criteria that were present in the record.

Therefore, this Court must assess the other purported justifications for the population deviations to determine whether Plaintiffs have carried their burden. Specifically,

---

[77] "The other policies [that could justify the deviations] were not causes of the population deviations in the House Plan and 2002 Senate Plan; nor indeed, were they priorities at all in drafting the plans. In fact, the defendant has never claimed that they were." *Larios*, 300 F. Supp. 2d at 1331.

the Court will search for "factors that are free from any taint of arbitrariness or discrimination" that may have caused the deviations. *Roman*, 377 U.S. at 710.

2. Adherence to the County Line Rule

Mapdrawers adhered to the County Line Rule, as they interpreted it, and Defendants argue that this caused the deviations in Plan H283. Under this Rule,

> whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

TEX. CONST. art. III, § 26. A rule of this sort was identified by the *Karcher* Court as a "legislative polic[y] [that] might justify some variance," so long as it is evenly applied. *See Karcher*, 462 U.S. at 740 ("Any number of consistently applied legislative policies might justify some variance, including, for instance . . . respecting municipal boundaries."). Therefore, the Court will analyze whether the County Line Rule was in fact a cause of the deviations in Plan H283 to determine whether it justifies them.

It is clear that use of the County Line Rule would necessarily result in a top-to-bottom deviation of close to 10%, which explains why the County Line Rule is a

legislative policy that can justify deviations from the statewide ideal. Using whole counties necessarily limits mapdrawers' ability to control the population within districts, and adherence to the County Line Rule would cause some top-to-bottom deviation in Plan H283, even if used in consistent and neutral ways on a countyby-county basis. For example, HD61 in Parker and Wise Counties (which is not challenged) is the most overpopulated district in Plan H283 with a deviation of 5.02% (8,417 persons), but adherence to the County Line Rule explains this deviation—the Rule necessitates the joinder of these two whole counties and the addition of their population. However, the most underpopulated district, HD90, is one of several districts within Tarrant County, and thus the County Line Rule did not dictate its exact size. Therefore, the County Line Rule does not explain the entire top-to-bottom deviation of Plan H283.

Moreover, application of the County Line Rule would not justify deviations among districts *within multi-district counties* (also referred to as "drop-in counties"). Such districts could have equal population based on a county ideal size or could all have roughly equal deviations from statewide ideal. Interiano calculated deviation only statewide, without looking at individual counties except to fit them in to the statewide deviation. Interiano 8-26-11 depo. (Joint Ex. J-61) at 10-11. Similarly, Solomons was not aware of any legal justification for intra-county deviations, but assumed the staff would know why there were deviations. Tr1596-98 (Solomons). Accordingly, many deviations (discussed below), which occur *within* counties, are not the result of the County Line Rule.

Dr. Alford made a broad-based attempt to justify the county-level deviations in light of the County Line Rule.

TrJ1872. He reached this general conclusion in two ways. First, he analyzed adjusted average population deviation by taking into account drop-in counties and examining their deviation from their county ideals. TrJ1872-73. To do this, he calculated a new ideal for all districts outside of drop-in counties, which he said would take out the possibility that data for these districts are being obscured by drop-in county districts. *Id.* He found that minority-majority CVAP districts are underpopulated by 172 persons and majority-Anglo districts are overpopulated by 91 persons. TrJ1873-74; D-168 at 24. Using SSVR, he found that SSVR-majority districts are overpopulated by 80 persons while districts below 50% SSVR are underpopulated by 21. TrJ1874; D-168 at 24.

Second, Alford analyzed deviations in all drop-in counties as a collective whole by using adjusted countywide ideals. TrJ1875. He found on average that minority-majority-CVAP districts are underpopulated by 149 persons and Anglo-CVAP-majority districts are overpopulated by 141 persons. TrJ1876; D-168 at 25. He further found that the average SSVR-majority district was 626 persons underpopulated and the average <50% SSVR district was 209 persons overpopulated. *Id.*

Crucially, however, Alford did not analyze any individual drop-in county, nor did he look for discriminatory patterns in particular areas.[78] TrJ1900. This deficiency in Alford's analyses makes his results consistent with Arrington's general view of Plan H283—when viewed in light of the County Line Rule, Plan H283

---

[78] The Court finds this particularly important because different mapdrawers were involved in drawing the different challenged areas.

may not exemplify a statewide, systematic pattern of overpopulation of minority districts, but there may nonetheless be individual geographic areas within the Plan where the one person, one vote principle was violated. TrJ1880 (Alford); TrJ1821 (Arrington).

Kousser went further, testifying that deviations and different treatment of urban Democrat districts—particularly Latino ones—simply cannot be explained by partisanship or the County Line Rule. Tr235-37. Martin's testimony also indicates the County Line Rule cannot explain many of the county-level deviations in Plan H283. According to Martin, there are 14 counties with two or more whole districts contained within them. Tr379. Of the 150 districts in the Plan, these 14 counties account for 93 of the districts. Tr380. Martin testified that each of these 93 districts could have been drawn to zero deviation, but that instead, eight of the 14 counties (accounting for 75 districts) have a deviation over 3.5% from the county ideal. Tr380-81. Implicit in this analysis is that each of these 93 districts could have been drawn without any deviation and without violating the County Line Rule because these districts are wholly contained within a county. According to Martin, there was never any other justification given for the deviations in Plan H283. Tr381.

Aside from the broad expert testimony that reveals flaws in Defendants' reliance on the County Line Rule to justify deviations, a close-up look at its applications in several individual areas (as discussed below) shows that it usually is not the cause of the challenged deviations and therefore cannot justify them.

3. Avoiding contests between incumbents and protecting incumbents

In *Karcher*, the Supreme Court specifically identified "avoiding contests between incumbent Representatives" as a "legislative polic[y] [that] might justify some variance," so long as it was consistently applied and nondiscriminatory. *Karcher*, 462 U.S. at 740; *see also LULAC v. Perry*, 548 U.S. 399, 412 (2006) (recognizing that avoiding the pairing of incumbents has been recognized as a neutral redistricting standard). This purported justification was at the heart of *Larios*; other than this factor, none of the other policies identified in *Karcher* were at issue. *Larios*, 300 F. Supp. 2d at 1331.

Looking to the numbers, the *Larios* court pointed out that in the House plan, "forty-seven incumbents were paired, including thirty-seven Republicans, which was 50% of the Republican caucus, but only nine Democrats, comprising less than 9% of that caucus (as well as one Independent [who was considered a Republican])." *Id.* at 1329. Six of the 21 districts involved in the pairing of incumbents were multi-member districts, meaning that 28 of the paired incumbents could be reelected while the other 19 would be unseated. *Id.* In the Senate plan, there were six incumbent pairings—four were Republican–Republican and two were Republican–Democrat. *Id.* The result of these pairings was the lost seats of 18 House Republican incumbents (compared to three Democrats) and four Senate Republican incumbents (compared to zero Democrats). *Id.* at 1329-30.

In addition to the raw numbers, the *Larios* court looked to the shapes of the districts, noting that they were drawn to force Republicans to run against one another,

along with the process for obtaining such a design: "[I]ndividual Democratic incumbents negotiat[ed] with the plans' drafters to draw them the safest possible districts." *Id.* at 1330. Not only did Democratic incumbents take these measures to secure their own seats, but they also "targeted particular Republicans to prevent their re-election." *Id.* In conclusion, the court tied these incumbency pairing measures together with the population deviations, noting that

> Republican-leaning districts are vastly more overpopulated as a whole than Democratic-leaning districts. Indeed, by one measure, the House Plan contains fifty overpopulated and thirteen underpopulated Republican-leaning districts, compared to only twenty-two overpopulated and fifty-nine underpopulated Democratic-leaning districts, and the 2002 Senate Plan contains nineteen overpopulated and seven underpopulated Republican-leaning districts, compared to only eight overpopulated and twenty-two underpopulated Democratic-leaning districts. Moreover, as we have noted, the large positive deviations often occurred in districts that paired Republican incumbents.

Id. at 1331 (internal citations omitted).

In part, this feature of *Larios* has been left open; as the court there stated, "[w]e need not resolve the issue of whether or when partisan advantage alone may justify deviations in population, because here the redistricting plans are plainly unlawful . . . [P]artisan interests are bound up inextricably with the interests of regionalism and incumbent protection. It is simply not possible to

draw out and isolate the political goals in these plans from the plainly unlawful objective of regional protection or from the inconsistently applied objective of incumbent protection." *Id.* at 1352. In *Harris*, the Court refused to answer a similar question of the permissible use of politics. 136 S. Ct. at 1310.

With this guidance in mind, an extensive analysis of incumbency pairing and protection is not necessary here, nor is an ultimate answer on the question of what role "politics as usual" may have played. The role of incumbency pairing in this case is much smaller than in *Larios*, where it was hotly contested and played a large role in the statewide outcome. Here, Plan H283 paired fourteen incumbents, only two of whom were Democrats. This is a far cry from the systematic level of pairing mostly Republican incumbents in *Larios*.

Solomons set the standard early in the process that only members of the same party would be paired, and this rule was consistently followed. Tr1427 (Interiano). The fact that only two Democrats were paired is due to the operation of the County Line Rule and redistricting leadership's views concerning whether districts were protected by the VRA. There is no indication that population deviations were used to target Democrat incumbents. However, Defendants also have not offered any evidence showing that any particular population deviations challenged by Plaintiffs were the result of avoiding incumbent pairings. In short, because neither side has presented evidence that mapdrawers created deviations to avoid the pairing of incumbents, this factor has little evidentiary value.

4. Compliance with the VRA

Aside from broadly stating the applicable burden of proof in challenges to plans where population deviation is below 10%, *Harris* provides an analysis of whether and how attempts to comply with the VRA can justify deviations. There, a three-judge district court panel found that the Arizona plan's 8.8% deviation was "primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role." *Harris*, 136 S. Ct. at 1306 (quoting the district court panel opinion, 993 F. Supp. 2d 1042, 1046 (D. Ariz. 2014)). The Supreme Court affirmed, with the conclusion that the record showed that Arizona's mapdrawers made a good-faith attempt at compliance with the VRA, which is a "legitimate state consideration that can justify some deviation from perfect equality of population."[79] *Id.*

---

[79] In finding that attempted VRA compliance was a "legitimate consideration" that might justify population deviations, the Court stated:

> In cases decided before *Shelby County v. Holder*, 570 U.S. –, 133 S. Ct. 2612 (2013), Members of the Court expressed the view that compliance with § 5 of the Voting Rights Act is also a legitimate state consideration that can justify some deviation from perfect equality of population. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.*, at 475, n. 12, (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.*, at 485 n. 2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *see also Vieth v. Jubelirer*, 541 U.S. 267, 284 (2004) (plurality opinion) (listing examples of traditional redistricting criteria, including "compliance with requirements of the [Voting

When creating the Arizona plan, an independent five-member redistricting commission created by the Arizona Constitution started with a grid-patterned map with a total deviation of 4.07%. *Id.* at 1308. After reviewing the grid and consulting with several legal and mapdrawing experts, all five Commissioners agreed that the plan would need to by precleared by the Justice Department under the VRA, and that the former benchmark plan contained 10 ability-to-elect districts. *Id.* After conducting an "iterative process" in which the Commissioners strengthened minority voting strength by adjusting the initial grid's boundaries, they published a new plan with 10 ability-to-elect districts for public comment. *Id.*

Around the same time, however, the Department of Justice indicated that it might not view the new plan as containing 10 ability-to-elect districts, but per normal DOJ protocol, it did not specify precisely how it would calculate ability-to-elect districts. *Id.* The calculations behind this determination were complex and in part unpredictable. *Id.* "The upshot [of the DOJ's process and calculations] was not random decision-making but the process did create an inevitable degree of uncertainty." *Id.*

This uncertainty, the Court said, "could lead a redistricting commission, as it led Arizona's, to make serious efforts to make certain that the districts it believed were ability-to-elect districts did in fact meet the criteria that the Department might reasonably apply." *Id.* The Commission reconsidered the boundaries of its plan,

---

Rights Act]"). It was proper for the Commission to proceed on that basis here.

Harris, 136 S. Ct. at 1306-07 (citations altered).

and decided to strengthen its ability-to-elect districts by making several changes. *Id.* Several of these changes were uncontroversial and were unanimously approved by the Commission. *Id.* at 1308-09. Others were not—a change to one of the boundaries was characterized as "'hyperpacking' Republicans into other districts" by a Republican member of the Commission. *Id.* at 1309. A Democrat proponent of the change replied that it could create an eleventh ability to elect district, and the change was ultimately approved. *Id.* When Arizona submitted this plan to the DOJ for preclearance, it cited these changes in support of its argument, even though the DOJ ultimately concluded that the changed district was not an ability-to-elect one. *Id.*

The Supreme Court found that the district court's conclusion that deviations were caused by good-faith attempts at compliance with the VRA was well supported in the record. *Id.* In sum, "'the record b[ore] out' that the deviations 'predominantly reflected . . . efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party.' In other words, the plaintiffs in *Harris* foundered not because their one person, one vote challenge failed as a matter of law, but because they did not muster the evidence needed to show it to be 'more probable than not that [the] deviation of less than 10% reflect[ed] the predominance of illegitimate reapportionment factors.'" *Raleigh Wake*, 827 F.3d at 341 (citations omitted).

5. Use of illegitimate redistricting factors

Because the burden of proof on these claims still rests on Plaintiffs to affirmatively show that it is more probable than not that a deviation of less than 10% reflects the

predominance of illegitimate reapportionment factors rather than legitimate considerations, the Court must assess the use of illegitimate factors as well as the legitimate ones discussed above. *See Harris*, 136 S. Ct. at 1307. In short, Plaintiffs argue that the State intentionally discriminated against minority voters by overpopulating minority districts and underpopulating Anglo districts. Such a practice is, of course, an illegitimate redistricting factor. *See Gaffney*, 412 U.S. at 751.

6. Analysis

i. Nueces County

Nueces County is a drop-in county with two districts, HD32 and HD34. Under 2010 census figures, it was apportioned 2.0295 districts based on the statewide ideal. Because the County had more than enough population for two districts, mapdrawers could have faithfully applied the County Line Rule *and* drawn two districts wholly contained in Nueces County, each with roughly equal population that was only slightly above the statewide ideal. In fact, mapdrawers did so in the initial versions of the House plan, including in the first public version Plan H113.

In Plan H113, HD32 and HD34 were roughly equally overpopulated—HD32 (Hunter's district) was 1.61% overpopulated and HD34 (the Latino opportunity district) was 1.34% overpopulated. Yet further changes were made that resulted in HD32 being underpopulated by 563 persons (a deviation of -0.34% from the statewide ideal) and HD34 being overpopulated by 5,512 (a deviation of 3.29% from the statewide ideal), nearly ten times the size

of the underpopulation in HD32.[80] As the numbers reflect, HD34 is significantly more Hispanic in population and significantly more overpopulated than HD32, which is significantly more Anglo and is underpopulated, despite the fact that there is enough population in Nueces County for *both* districts to be overpopulated.[81] Based on this evidence of the use of race in drawing the lines in Nueces County to overpopulate the minority district while underpopulating the Anglo district, the Court finds that Plaintiffs have proven *Larios* claims here.

ii. Hidalgo County/HD41

The County Line Rule also does not explain the population deviations in the Hidalgo County districts. Hidalgo County was not a drop-in county because it had surplus population. In Plan H283, four districts are wholly contained within Hidalgo County—HDs 36, 39, 40, and 41. Three of these four districts are overpopulated—HD36

---

[80] Between Plan H113 and H153, HD34 went from 1.34% overpopulated to 2.89% overpopulated; from Plan H153 to Plan H283, overpopulation in HD34 rose further still to 8.29%.

[81] The only potential explanation given by Defendants concerning population disparities in Nueces County is that mapdrawers sought to draw HD34 as a district that would perform reliably for Latino voters. However, that justification is demonstrably *not* the reason for the population disparity between HD32 and HD34 in Plan H283. When mapdrawers initially drew the two Nueces County districts with roughly equal population, David Hanna assessed HD34 as "clearly performing" in his retrogression memos, and Solomons later touted HD34 in Plan H113 as being a "performing" Latino district in Nueces County. D-327; D-206. Thus, the further changes that led to the population disparities cannot be explained by needing to make HD34 a "performing" Latino opportunity district. Thus, neither the County Line Rule nor compliance with the VRA explain the population deviations in Nueces County.

has a 2.61% deviation (4,368 persons), HD39 has a 4.62% deviation (7,746 persons), and HD40 has a 3.49% deviation (5,856 persons). The fourth, HD41, is underpopulated by 4.41% (-7,399 persons), even though Hidalgo County is overpopulated to the point where it must shed excess population into HD31, which includes Starr and Zapata Counties to the west.

A comparison of the racial makeup of the underpopulated HD41 to the three overpopulated districts in Hidalgo County reveals that HD41 is significantly less Hispanic than the other three districts. The overpopulated districts all have an HCVAP above 80% (HD36 is 88.7%, HD39 is 82.4%, and HD40 is 89%), while the underpopulated HD41 is 72.1% HCVAP. The difference is starker in terms of total SSVR—HD36 is 85.1%, HD39 is 82.2%, and HD40 is 85.8%, while HD41 is 63%.[82] As in Nueces County, the County Line Rule does not explain deviations *within* Hidalgo County, and Defendants have not even suggested that these deviations were necessary to comply with the Rule. Rather, these deviations disadvantage the more Hispanic districts to the benefit of the less Hispanic HD41. And the record shows that the true reason for this deviation was to ensure that Republican incumbent Rep. Peña had a favorable district (one that had more Anglo population and less Hispanic population).

Incumbency protection (not necessarily avoiding the pairing of incumbents) was a large factor in Hidalgo County (particularly in HD41). As discussed above,

---

[82] HD31, the district with which Hidalgo County shares its surplus population, is overpopulated by .6% (999 persons) and is 90.8% SSVR.

Hidalgo County contains four whole districts, three of which are overpopulated and one of which is underpopulated (HD41). Interiano drew the initial configuration of what became HD41 in the final Plan H283 with the express goal of giving Peña the best chance to get re-elected. Although Downton made some changes to address the fact that HD41 was underpopulated, the findings of fact detail the use and purposes of these changes—particularly, the many precinct splits, some of which use race as a proxy for partisanship—and based on this evidence we reach the unmistakable conclusion that the underpopulation of HD41 was intentional, politically motivated, and explained by race.

Mapdrawers' express and admitted political goal of protecting the incumbent Peña in HD41 went too far in its use of race and partisanship. Thus, though political motivation of protecting the Republican incumbent Peña was the proffered justification for the deviations in Hidalgo County, the means of accomplishing this goal (the illegitimate use of race to split Latinos off into the overpopulated districts of Hidalgo County while hoarding Anglos into the underpopulated HD41 and intentionally leaving it underpopulated compared to its neighboring districts to avoid adding in more Hispanics) was not a legitimate, neutrally applied redistricting policy. The underpopulation of HD41 and overpopulation of the surrounding districts was intentional, with the stated goal of maximizing Republican performance and the unstated goal of limiting Hispanic population in HD41 to get Peña reelected. Tr1478 (Interiano).

Implicit in this discussion so far is that the underpopulation of HD41 is the cause of the relative overpopulation of Hidalgo County's other districts. Of

course, adherence to the County Line Rule in a county that as a whole is overpopulated (such as Hidalgo County) will necessitate some overpopulation of all districts within the county, though it will not explain underpopulation of any of them (like HD41). But the uneven application of political protection, especially when furthered by race-based precinct splits that fit the larger allegation of burying Latino voters into overpopulated districts, is not a legitimate reapportionment policy that can justify the county-level deviations between HD41 and its surrounding districts. Accordingly, the purported use of incumbency protection in HD41 cannot justify the overpopulation of the surrounding districts in Hidalgo County.

Defendants argue that population deviations in Hidalgo County are justified when viewed in terms of different population metrics. They point out that the VAP of the districts in Hidalgo County is as follows: 104,939 (HD31), 111,643 (HD36), 114,761 (HD39), 112,156 (HD40), and 111,689 (HD41, Peña's district). Docket no. 457 at 41–42. They further point out that the CVAP of these districts is as follows: 56,380 (HD31), 67,940 (HD36), 74,275 (HD39), 69,900 (HD40), and 79,770 (HD41, Peña's district). *Id.* at 42. Based on these figures, HD41 has the highest CVAP of all districts in Hidalgo County, and ranks in the middle in terms of VAP. Thus, Defendants argue, whatever disparity exists among the total population in the five Hidalgo County House districts, it does not diminish the voting strength of voters outside HD41. *Id.* at 42.

This argument is nothing more than an after-the-fact attempt to justify population deviations that were illegitimately drawn into Hidalgo County in the first

place. Nothing in the record indicates that mapdrawers relied on VAP or CVAP to achieve population equality in Plan H283. Rather, it is undisputed that they measured their compliance with one person, one vote requirements by *total population*, and they cannot now use VAP or CVAP numbers to make post-hoc arguments that no violation occurred. The argument further misses the point because it does not explain how or why the population deviations exist. An emphasis on high VAP and CVAP in HD41 is not an explanation for the deviation but rather stems from the same common cause of the deviations—the admitted goal of intentionally underpopulating HD41 to create a less-Hispanic, Republican district that would ensure Peña's reelection. A person with knowledge of the area would know how to do this by splitting precincts, and the precinct splits in HD41 reflect precisely this goal with the added side effect of increasing VAP and CVAP. Therefore, despite Defendants' attempt to minimize the harm from deviations in HD41, the population deviations in Hidalgo County are not the result of any legitimate redistricting considerations, and instead were driven only by the partisan objective of reelecting Peña, which was achieved in part through the use of race. Absent the use of any other legitimate redistricting principles, these population deviations, like those in *Larios*, result from the "inconsistently applied objective of incumbent protection."

iii. Dallas County

The 8.88% top-to-bottom deviation within Dallas County cannot be explained by the County Line Rule. Dallas County's population decreased compared to the rest of the state, which resulted in Dallas County having

enough population for 14.1266 districts, such that all districts in Dallas County theoretically could have been overpopulated. That was not the case in Plan H283.

Both Latino districts in Dallas County are overpopulated—HD103 deviates from the statewide ideal by 5% (8,379 persons) and HD104 deviates by 3.07% (5,147 persons). One of the four African-American districts is overpopulated—HD109 deviates from the statewide ideal by 3.9% (6,539 persons)—while the other three are underpopulated—HD100 is -3.87% (-6,494 persons), HD 110 is -0.05% (-90 persons), and HD111 is -0.39% (-658 persons). Therefore, three of the six minority districts in Dallas County are overpopulated, and three are underpopulated. This same ratio of overpopulated-to-underpopulated districts was true for Anglo districts in Dallas County, as four are overpopulated and four are underpopulated. But the underpopulation of Anglo districts in Dallas County was more severe,[83] while the overpopulation was not as severe.[84] Based on these numbers alone, minority voters in Dallas County fared worse than Anglo voters. This is especially true when looking specifically at Latino districts—HD103 was overpopulated by 5% and HD104 was overpopulated by 3.07%.

The potentially problematic deviations in Dallas County are confined to the interplay between the two Latino districts (HDs 103 and 104) and the Anglo district

---

[83] The average deviation in an underpopulated minority district in Dallas County is -1.44%, while the average deviation of an underpopulated Anglo district in Dallas County is -1.85%.

[84] The average deviation in an overpopulated minority district in Dallas County is 3.99%, while the average deviation of an overpopulated Anglo district in Dallas County is 3.10%.

to their west, HD105. The two Latino districts are overpopulated by an average of 4.04% from statewide ideal (HD103 by 5.00% and HD104 by 3.07%). HD105 is also severely overpopulated at 4.83%. As the following will make clear, the composition and overpopulation in these western Dallas County districts is mostly caused by shifts of population among the three districts. Thus, it appears that the rest of Dallas County is not problematic, and simply does not match the Plaintiffs' broad theory that minorities were systematically disadvantaged by being crowded into overpopulated districts.[85]

Kousser opined that HD103 and HD104 (the two overpopulated Latino districts) were overpopulated to "pack" as much Latino population as possible into those districts, making it much more difficult to draw additional opportunity districts for the minority population growth, which accounts for 100% of Dallas County's 350,000 population growth (in fact, Anglo population decreased by 198,000 in Dallas County). Anchia, HD103's representative, was himself displeased with the overpopulation of his district, and felt that there was an effort to put a lot of unnecessary population into the district. Arrington made a similar observation, noting that Hispanic districts are overpopulated, which makes it more

---

[85] The numbers bear out this conclusion. Not counting the two Latino districts that are subject to closer scrutiny, the average minority district in Dallas County was actually *under*populated at -.10% deviation from statewide ideal while the average Anglo district (not counting HD105) was overpopulated by .03%. Thus, because overpopulation in the Anglo districts is more severe than in the minority districts, Plaintiffs have not shown that Dallas County as a whole uses population deviations to systematically disadvantage minority voters.

difficult to create another minority district. TrJ222. Martin's analysis was more technical, pointing out that the 8,091-person excess in HD105 (4.83% overpopulation) is Anglo population drawn from the south, which makes the district less likely to elect Latino candidates of choice. TrJ330-32. The only explanations given for this strange configuration of west Dallas County are that mapdrawers needed to pair Rep. Anderson with Rep. Harper-Brown and needed to maintain SSVR in HD103 and HD104. TrJ2018 (Downton).

The map of these western districts in Dallas County supports the experts' conclusions, as described in the discussion of Plaintiffs' vote dilution claims above. The boundary of HD105 divides the cities of Grand Prairie and Irving, and splits 22 precincts along with numerous communities of interest. Tr321-23 (Martin); US-387 at 7; US-299. It represents a drastic change from the benchmark, extending much further out with jagged, bizarrely shaped lines. TrJ1107-08 (McPhail). The portion of HD105 that reaches into Grand Prairie picks up "the most Anglo part of the city," follows the "least Hispanic channel that could have been drawn," and leaves seven split Latino precincts in HD104. Tr321-22 (Martin). These precinct splits placed a disproportionately affluent Anglo population in HD105 and a disproportionately low-income Hispanic population in HD104. *E.g.*, TrJ151 (Arrington); TrJ599-609 (Lopez). HD103 contains a long, narrow arm of mostly Latino population that extends through HD105 in Irving and splits 10 precincts, removing all of this Hispanic population from HD105. Tr323 (Martin).

Downton deliberately split precincts by using race to put Hispanic voters in HDs 103 and 104 while keeping them out of HD105. TrJ2020-24 (Downton). Increasing

the Anglo population of HD105 prevents it from providing minority opportunity. The Perez Plaintiffs presented demonstration Plan H288, with a total deviation of 1.72% and which maintained HD105 with a combined B+HCVAP of 45.8% using 2005-2009 ACS data and 50.1% using 2008-2012 ACS data, while otherwise containing the same number of BCVAP-majority (3) and HCVAP-majority (1) districts as Plan H283 using 2008-2012 ACS data. Joint Ex. J-33; D-110.

Although Downton indicated in his deposition that it would be hard to maintain the SSVR of HD103 at closer to ideal population, he agreed at trial that it was *not* necessary to have a 5% deviation in HD103 to maintain the Hispanic population, and that there were others ways to have done it, "but that was a policy decision." TrJ2149. Maps such as Plan H288 show that the SSVR of HD103 could be maintained or even increased without such overpopulation. Joint Map. Ex. J-33 (HD103 is 38.7/40.6% SSVR while only 1.31% overpopulated).

Further, between Plan H113 and Plan H283, the total population was increased, but the non-suspense SSVR (available to mappers in RedAppl) was not. The overpopulation increased from 4.59% to 5%, while non-suspense SSVR remained at 38.1% (total SSVR went up .1%). D-112 at 10, 30. Downton had also testified that HD103 was overpopulated because he worked with Rep. Anchia to include that population, but Rep. Anchia was not happy that his district was overpopulated and felt that extra population had been included unnecessarily. Tr999; TrJ2017. Thus, none of Downton's explanations for the overpopulation of HD103 are credible.

These facts are compelling. As indicated in the discussion on Plaintiffs' § 2 claims, the mapdrawers

intentionally diluted minority voting strength in western Dallas County in part by manipulating total population. But Plaintiffs overlook that the net result of this manipulation does not manifest itself in racially inequitable deviations among the three districts that were trading population for one person, one vote purposes—the Anglo HD105 deviates from the statewide ideal by 4.83%, which is more than the average deviation in HD103 and HD104. While the lines were drawn to push Latino population into the Latino districts, they were also drawn to push Anglo population into HD105. This practice in itself, as discussed above, may be illegal in other ways. But in terms of overpopulation, Anglos in HD105 fared just as poorly as did the Latinos of HDs 103 and 104. In short, the overpopulation in western Dallas County may be an intentional vote dilution tactic, but when it is viewed in light of the relationship between the districts that caused this overpopulation, the deviations themselves are not the basis for a one person, one vote claim.[86]

---

[86] The Court notes a tension between the standard for a § 2 intentional vote dilution claim and a *Larios* claim, which helps explain why Plaintiffs succeed on the former but fail on the latter in western Dallas County. To succeed on a § 2 intentional vote dilution claim, Plaintiffs have the burden of showing that discriminatory purpose is a "motivating factor"; they need not show that race was the sole decisionmaking factor or motivation. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016). To succeed on a *Larios* claim, Plaintiffs have the burden of showing that illegitimate reapportionment factors "predominated" in bringing about the challenged population deviations. *Harris*, 136 S. Ct. at 1307. Of course, one such illegitimate reapportionment factor would be the improper use of race. Thus, a plaintiff challenging population deviations through a *Larios*-type one person, one vote claim would have to show the *predominance* of illegitimate reapportionment

Accordingly, Plaintiffs have not shown that Dallas County's population deviations reflect the predominance of illegitimate redistricting factors.

iv. Harris County

As in Dallas County and several others, the Court first dispels the assertion that the County Line Rule explains deviations in Harris County. Overall deviation among districts within Harris County is 9.74%, but a map could have been drawn with only 1.81% deviation (this would have been easy, according to Martin). Tr356-58. Because the Legislature chose to go with 24 districts, there was enough population to draw all districts at or above the statewide ideal. Despite the ability to overpopulate all districts, some districts were underpopulated and some were overpopulated.[87]

---

factors (including race), while a plaintiff bringing a § 2 intentional vote dilution claim would only have to show that a racially discriminatory purpose is a "motivating factor" because the VRA is concerned with racial motives and not others. Section 2 of the VRA is not concerned with whether a district is over- or under-populated *per se*, but whether its configuration was produced at least in part by a racially discriminatory/dilutive motive. In contrast, the harm in a one person, one vote context is being in an overpopulated district. In short, a *Larios* plaintiff can rely on evidence of a broader array of redistricting practices to reach the higher predominance standard; a § 2 intentional vote dilution plaintiff has to present evidence limited to racially discriminatory purpose, but need only satisfy the lower "motivating factor" standard.

[87] This analysis of the County Line Rule does, however, belie MALC's assertion that "[t]here is no explanation as to why three out of 4 majority Latino districts in Harris County are overpopulated." Docket no. 1185 at 9. Because Harris County was drawn down to 24 districts, there was sufficient population in the County to overpopulate *all* districts.

Of the 24 districts in Harris County, 13 are Anglo majority and 11 are majority minority.[88] Of the 13 Anglo districts, 10 were overpopulated while three were underpopulated. Of the 11 minority districts, eight were overpopulated while three were underpopulated. Thus, the percentage of Anglo districts that were overpopulated (10/13, or approximately 77%) was actually greater than the percentage for minority districts (8/11, or approximately 73%).

The average Anglo district is overpopulated by 1.51%, while the average minority district is overpopulated by 1.97% compared to the statewide ideal. Based on the county ideal,[89] the deviations appear smaller, though the difference between average deviation of an Anglo district (-.21%) and that of a minority district (.25%) is roughly the same. These numbers take into account the three underpopulated Anglo and three underpopulated minority districts. Looking only at these underpopulated districts, underpopulated minority districts (-2.86% from statewide ideal) are actually *more* underpopulated than their Anglo counterparts (-2.09% from statewide ideal).

The raw data in Harris County points in conflicting directions. The likelihood that an Anglo district will be overpopulated is higher than the likelihood that a minority district will be overpopulated. An average minority district, however, will have more overpopulation than an average Anglo district. Both statistical measures

---

[88] HD148 and HD137 were both non-majority HCVAP, but were performing for Latinos and minorities. For purposes of this analysis, they are counted among the 11 minority districts.

[89] The total population of Harris County's districts (4,092,459) divided by the number of districts in the County (24) yields the county ideal—170,519.

of the overpopulation in Harris County are close—the difference between the occurrence of overpopulation in a district of each type is only about 4%, and the difference in overpopulation between an average district of each type is only about .46%.

Considering these numbers, Plaintiffs have not shown that it is more probable than not that the deviations reflect the predominance of illegitimate reapportionment factors rather than legitimate considerations. The difference in overpopulation between the average minority district (1.97%) and the average Anglo district (1.51%) is slight. A difference so slight may be the result of many incidental or legitimate reapportionment criteria. The Plaintiffs have simply not provided evidence to affirmatively state which illegitimate factors were used in drawing the Harris County lines, and how deviations so small among the Anglo and minority districts resulted from these factors predominating in the mapdrawing process. At most, Plaintiffs have provided circumstantial evidence in the form of a pattern of overpopulation in minority districts in Harris County. But that evidence is particularly weak given the small difference in overpopulation between Anglo and minority districts and the higher percentage of overpopulated Anglo districts. Accordingly, Plaintiffs have failed to carry their burden.

v. Tarrant County

Application of the County Line Rule cannot explain the deviations within Tarrant County. Tarrant County contains the smallest district in the entire plan—HD90, with a deviation from the statewide ideal of -4.90% (8,209 persons). Despite this fact, the Court does not find that the population deviations within Tarrant County support

Plaintiffs' one person, one vote claim. The Court has found that redistricters increased the SSVR in HD90 in bad faith, but doing so required them to *underpopulate* HD90. Further, the minority districts in Tarrant County are all underpopulated (HD90 is -4.90%, HD95 is -3.58%, and HD101 is -1.77%), and HD90 and HD95 are the most underpopulated in the County, while two Anglo districts (HD97 and HD99) are overpopulated. The one person, one vote challenge in Tarrant County fails.

vi. Fort Bend County

Unlike in many of the other counties, where the County Line Rule does not explain the existence of deviations within a county, Fort Bend County's relatively small deviations can be explained by the mapdrawers' need to work within the confines of the County Line Rule. Suburban Fort Bend County experienced significant growth, so mapdrawers turned the County from two wholly contained districts with some surplus into three wholly contained districts with some surplus. This spillover was joined with Wharton and Jackson Counties in HD85.

The districts in Fort Bend County deviate very little from one another—HD26 deviates from the statewide ideal by -4.50% (7,546 persons), HD27 deviates by -4.51% (7,553 persons), and HD28 deviates by -4.33% (7,264 persons). Within the confines of the County Line Rule, the underpopulation of these districts was apparently caused by a legitimate need to increase the size of the spillover to combine it with two other counties to form a new district. In addition, HD27, the minority district, is the *most* underpopulated. These districts do not manifest problematic population deviations. Plaintiffs have not

shown that it is more probable than not that the population deviations in Fort Bend County (and specifically, the challenged HD26) reflect the predominance of illegitimate reapportionment factors rather than legitimate considerations. The one person, one vote challenge to Fort Bend County fails.

vii. Bell and Lampasas Counties

The Court next looks to Plaintiffs' challenges to Bell and Lampasas Counties and their two districts, HDs 54 and 55. In the prior plan, HD54 combined all of Burnet County, all of Lampasas County, and a small extension in the western side of Bell County. The extension into Bell County contained almost all of the city of Killeen, which previously contained only a minor split (separating only 200 residents from the city). HD55 was composed of the remainder of Bell County.

In Plan H283, Burnet County is removed from HD54 and no longer combines with any part of Lampasas or Bell Counties. The departure of Burnet County's population left HDs 54 and 55 without sufficient population to fill two full districts, and both could have been underpopulated compared to the statewide ideal. Yet HD54 (Aycock's district), which combines all of Lampasas County with the western section of Bell County, is overpopulated compared to the statewide ideal by 0.06%, while HD55 (the remainder of Bell County) is underpopulated at -3.26%. A comparison of the prior and current maps reveals that it would have been relatively easy to draw HD54's extension into Bell County in a way that left both HDs 54 and 55 equally underpopulated, but this was not done.

The changes in Plan H283 that created the existing deviations are problematic in terms of the vote dilution that they cause (which has been previously discussed) and the population deviations that they create (which are discussed below). With Burnet County removed, HD54 lost 42,000 voters, and went from 29,000 overpopulated to 13,000 underpopulated. TrJ1402 (Korbel). Mapdrawers then removed *more* population from HD54. To do this, they enlarged what was previously a minuscule, 200-resident split in the city of Killeen. The new split removed a larger, mostly minority segment of Killeen's population—32,000 persons, about two-thirds of whom were minorities—from HD54 and placed it into HD55. TrJ1404 (Korbel). At the same time, Plan H283 made a change in the other direction by removing 47,000 mostly Anglo persons from southwest Bell County (formerly in HD55) and placing them in HD54. TrJ1405 (Korbel). The net result was a 15,000 population shift from HD55 to HD54, with HD54 becoming more Anglo by gaining residents from southwest Bell County and less minority by splitting Killeen. In terms of population deviation, these changes left HD54 at 0.06% overpopulation and HD55 at -3.26% underpopulation, even though both could have easily been underpopulated.

The Court has already recounted both the goal of these changes and the means for achieving this goal. In short, the goal was to draw two Republican districts, but the means for accomplishing this goal was splitting minority population in Killeen and making Aycock's district more Anglo. And, as previously detailed, this constituted evidence of intentional vote dilution under § 2 of the VRA and the Fourteenth Amendment.

Aside from the intentional vote dilution caused by the population shifts among HDs 54 and 55, these same shifts also caused population deviations in contravention of the one person, one vote principle. Because both districts could have been underpopulated compared to the statewide ideal, the one person, one vote principle, when combined with the County Line Rule, counsels that any deviations between the districts should be justified by legitimate redistricting criteria. Here, however, the motives for changes that caused the deviations were exceedingly political and racial.

In order to ensure that both districts remained Republican, mapdrawers traded 47,000 mostly Anglo voters in HD55 for 32,000 mostly minority voters in HD54 by splitting Killeen. In doing so, mapdrawers intentionally used race in a way that would overwhelm the remaining Latino voters of HD54 with the new influx of Anglo voters while also stranding a large portion of Killeen's minority voters in the already heavily Anglo HD55. As a result, mapdrawers exacerbated the existing population deviations, which could have easily been remedied. In light of the overtly political goals, the use of race, and the absence of any other justification for the population deviations, the Court finds that deviations here resulted from the predominance of the illegitimate use of race to ensure that both districts remained Republican.

viii. Statewide Claims

In sum, the Plaintiffs have shown by a preponderance of the evidence that population deviations in the following areas reflect the predominance of illegitimate reapportionment factors: Nueces County, Hidalgo

County, and Bell/Lampasas Counties. Plaintiffs *have not* shown the same in the following areas: Dallas County, Harris County, Tarrant County, Fort Bend County, and everywhere else in the state.

The relative failure of Plaintiffs' localized *Larios* claims obviates the need for a particularly detailed analysis of their statewide challenge to Plan H283 as an undifferentiated whole. Areas in which Plaintiffs' *Larios*-type, one person, one vote claims succeeded directly implicate only nine districts out of the 150 in Plan H283. As described in detail above, though Defendants have not affirmatively explained many deviations in the remaining areas of the state, Plaintiffs have likewise failed to do so in those areas.

Broadly, the evidence shows that deviations exist, and that mapdrawers worked under the mistaken belief that these deviations could exist without justification. Plaintiffs point to a conglomerated view of population deviations across the state and encourage the Court to draw the inference that these deviations must have been caused by mapdrawers' desire to harm minority voters. Otherwise, the Plaintiffs point to little specific evidence in the record in support of their claims. Though the Court recognizes that such circumstantial evidence may be used to prove a violation of the one person, one vote principle, as was done in *Larios*, the evidence here simply is not strong enough to show the statewide predominance of illegitimate factors in creating the population deviations in Plan H283, except for in the few isolated areas described above. Plaintiffs' statewide *Larios* challenge to Plan H283 fails.

V.

The Court turns briefly to address a fundamental flaw in Judge Smith's dissent. His analysis conflates the standards for *Shaw*-type racial gerrymandering claims and intentional vote dilution claims into one test—"race for its own sake"—derived from the Supreme Court's recent decision in *Bethune-Hill*. However, in first recognizing the *Shaw*-type racial gerrymandering claim, the Supreme Court cast it as "analytically distinct" from a vote dilution claim. *Shaw v. Reno*, 509 U.S. 630, 652 (1993). This view was reaffirmed in *Miller v. Johnson*, 515 U.S. 900, 911 (1995), when the Court stated that "*Shaw* recognized a claim 'analytically distinct' from a vote dilution claim." The parties have recognized this distinction throughout this case, as this Court noted in its congressional plan opinion. Docket no. 1339 at 122 ("All parties agree that an intentional vote dilution and a *Shaw*-type racial gerrymandering case are analytically distinct.").

This Court also recognized in its opinion on the congressional plan that the Supreme Court recently reaffirmed in *Alabama LBC* that a *Shaw*-type racial gerrymandering claim is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." Docket no. 1339 at 30 (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (emphasis omitted)). The plaintiff's evidentiary burden in a *Shaw*-type claim is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."

Alabama LBC, 135 S. Ct. at 1267. This Court further acknowledged that *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788 (2017), reaffirmed the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in *Alabama LBC*. Docket no. 1339 at 30 n.26. *Bethune-Hill* considered only *Shaw*-type racial gerrymandering claims, not vote dilution claims.

The Supreme Court developed the predominance test to determine whether voters were being placed into districts on the basis of race as opposed to traditional districting principles. Although the parties have argued over whether certain language from the *Shaw* line of cases is relevant to and can be applied to the vote dilution analysis, no party, witness, or expert has asserted that the predominance test applies to Plaintiffs' vote dilution claims. Defendants argue that racial discrimination must have been a cause in fact of the legislative action, but they agree with Plaintiffs that the test is whether racial discrimination was a substantial or motivating factor behind enactment of the law. Docket no. 996 (Defendants' Motion for Summary Judgment) at 5-6, 12 ("The question is whether intentional racial discrimination was a substantial or motivating factor in the enactment of the . . . plans and, if it was, whether those plans would have been enacted in the absence of a discriminatory purpose.").

In the congressional plan opinion, this Court agreed that "statements made about determining motive in the *Shaw*-type cases can have application to intentional vote dilution cases, even though *Shaw*-type cases involve a different motive than intentional vote dilution cases" because "[w]hether partisanship provides an explanation

for the specific lines that were chosen is relevant to both motive inquiries." Docket no. 1339 at 122-23. However, while the issue of race predominance must be determined in a Shaw-type claim, intentional vote dilution may be found when race motivated the districting decision, along with other factors. Regardless of whether political motives also played a part or even dominated, if racial discrimination was a motivating factor for the legislative action and the other criteria for an intentional vote dilution claim are satisfied, the districting decision violates the Constitution.

VI. Summary

With regard to the § 2 results claims, the Court finds that remedied claims are moot (specifically in El Paso, Bexar, and Harris Counties). With regard to non-remedied claims, the Court finds that Plaintiffs have either failed to prove a § 2 results claim as to Plan H283 or that such claims are best resolved in the 2013 plan case.

With regard to the intentional vote dilution claims under § 2 and the Fourteenth Amendment, the Court finds that Plaintiffs proved their claims in El Paso County (HD78), Bexar County (HD117), Nueces County (the elimination of HD33 and the configuration of HD32 and HD34), HD41 in the Valley, Harris County, western Dallas County (HD103, HD104, and HD105), Tarrant County (HD90, HD93), Bell County (HD54), and with regard to Plan H283 as a whole.

With regard to the *Shaw*-type racial gerrymandering claims, the Court finds that only the Task Force alleged such claims, and its claim against HD117 in Bexar County succeeds but its claim against HD77 and HD78 in El Paso County does not.

With regard to the one person, one vote *Larios*-type claims, the Court finds that Plaintiffs' statewide claims fail, but they succeed in proving violations in the Nueces County districts (HD32 and HD34), the Hidalgo County districts (HD31, HD36, HD39, HD40, and HD41), and the Bell/Lampasas County districts (HD54 and HD55).

SIGNED on this 20th day of April, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

/s/
ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

For Texas Democrats, 2010 was a perfect storm. The nationwide Republican surge, whether attributable to the Tea Party movement or otherwise, played out on the big screen in Texas, resulting, as the majority recognizes, in a colossal increase in the number of Republicans elected to the Texas House of Representatives and unexpected wins by Republicans in the Texas Congressional delegation. That was timed ideally with the fact that the November election was followed immediately by the results of the 2010 decennial census and redistricting. The 2011 Legislature squeezed every conceivable ounce of advantage from this coincidence, making every possible effort to maximize the number of Republicans to be elected and re-elected in 2012 and beyond.

This litigation followed. The core question is whether the redistricting was lawful as an exercise of political power won in fair biennial elections or, instead, was in violation of the Voting Rights Act ("VRA") and the Constitution. At one point in their impressive opinion, the judges in the majority correctly find

> that Plaintiffs have failed to prove intentional vote dilution . . . . Specifically, they have failed to show that mapdrawers acted with an intent other than maintaining their Republican districts or that they used race for partisan advantage. Because of the high correlation between race and party, splitting Democrats, eliminating Democratic districts, and shoring up districts for Republican incumbents

> necessarily affects minorities, but that alone is not intentional vote dilution based on race.

Majority op. at 66. But alas, that announcement is made only in regard to "cracking claims in northeast Dallas County." Because it more properly should be applied to the entirety of the state House and Congressional redistricting, I respectfully dissent.

Despite its exhaustive and careful examination of the record, the majority commits grave error in its recitation of redistricting law, so its findings of fact based on that misreading do not enjoy the protection of the clearly-erroneous standard. And even under the clearly-erroneous test, the majority's findings are fatally infected, from start to finish, with the misunderstanding that race, rather than partisan advantage, was the main reason for the Congressional and state house districts drawn in 2011.[1]

Despite its honorable intentions, the majority concocts the most extreme possible reading of the raw record to justify findings that, if converted to corresponding remedies, will hand these plaintiffs pretty much everything they have sought, causing a wholesale revision

---

[1] The exception is Part IV of the majority opinion, regarding the one-person-one-vote claims based on population deviation, with which I concur. As the majority convincingly demonstrates, in the redistricting process the State erred in assuming, without support in the law, that the ten-percent test offers an unassailable safe haven. I also agree with the ruling on standing.

in the State House and Congressional maps. In 2011, I warned that

> [t]he judges in the majority, with the purest of intentions, have . . . produced a runaway plan that imposes an extreme redistricting scheme for the Texas House of Representatives, untethered to the applicable caselaw. The practical effect is to award . . . a slam-dunk victory for the plaintiffs . . . at the expense of the redistricting plan enacted by the Legislature . . . .

Perez v. Perry, 835 F. Supp. 2d 209, 218 (W.D. Tex. 2011) (Smith, J., dissenting). The majority there erred. The Supreme Court promptly and unanimously vacated and remanded. *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam).

In the intervening five years, apparently nothing much has changed in terms of the majority's view of who wins and loses.[2] Granted, there have been extensive proceedings, resulting in a massive record, and the procedural posture is much different from what it was in 2011–12. Nonetheless, the majority's jaundiced perspective of the Texas Legislature and its minions seems fixed. We will see how it fares on ultimate appeal.

In this opinion, I will reiterate that because of mootness, this court is without jurisdiction in regard to the 2011 state House and Congressional plans. I will show how the majority is wrong on the law. And I will

---

[2] The majority's enthusiasm for the plaintiffs' case is shown by the fact that, in at least one instance, it even invents a claim that the plaintiffs missed—what it believes is "a clear *Shaw*-type racial gerrymandering claim." Majority op. at 57 n.46.

demonstrate that the majority's factual findings are so extreme as to defy logic and reason under this record.

I. Mootness deprives this panel of jurisdiction.

In dissenting from the majority's March 10, 2017, opinion on the 2011 Congressional plan,[3] I showed that the proceedings for the 2011 Congressional and State House plans are moot under the binding authority of *Davis v. Abbott*, 781 F.3d 207 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015). Nothing has changed to fix that fatal defect. Like all district courts, this court has an obligation to examine its own jurisdiction. This panel should promptly dismiss the 2011 suit for want of jurisdiction. Had it done so in 2015, when certiorari was denied in *Davis*, these proceedings would be much further advanced.

II. The majority misreads the applicable law.

Reduced to its barest essentials, the key question of law (assuming this is not moot) is whether plaintiffs have established that the legislature employed "race for its own sake." As recently as March 2017, the Supreme Court has repeated that the answer is "no."

As I showed in my recent dissent on the 2011 Congressional maps,[4] the elephant in the room is *Bethune-Hill v. Virginia Board of Elections*, 137 S. Ct. 788 (2017). There the Court twice repeats the test, quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995), that plaintiffs must prove "that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Bethune-Hill*, 137 S. Ct. at 798.

---

[3] *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at *243–263 (W.D. Tex. Mar. 10, 2017) (Smith, J., dissenting).

[4] *See id.* at *266–270 (Smith, J., dissenting).

"[R]ace for its own sake" must be "the overriding reason for choosing one map over others." *Id.* at 799. And how do we know whether "race for its own sake" drives a redistricting decision? It occurs when "race was the criterion that, in the State's view, could not be compromised." *Id.* at 798 (citation omitted).

Under *Bethune-Hill*, a legislative decision is suspect when it treats a person of color or of a certain ethnicity differently for no reason other than race, based on some reprehensible basis such as perceived inferiority or on a theory that persons are essentially different because of race. Thus, a retailer in the Deep South in 1960 might turn away black customers, regardless of how well they are dressed, how they behave, or how much money they wish to spend, on no basis other than race. Or, in the electoral context, a minority voter, to register, might be required to satisfy extra requirements for the sole reason of race and not because of his or her legal qualifications or how he or she is likely to vote.

To be sure, there is raw "race for the sake of race" in this record, but not from state actors or their witnesses. As the majority's findings on the 2011 Congressional redistricting state (pages 369–72), Congressman Al Green, an African-American Democrat, as well as plaintiffs' expert Dr. Richard Murray, testified to complain that Green's Houston-area district, CD9, was initially drawn with "a clear African-American plurality, but at the time of redistricting Hispanic total population was beginning to exceed the Black population." In the 2011 plan, CD9 "gain[ed] heavily Latino and upscale areas" (which can only be a proxy for "white people"), "which might change the *character* of the district as an African-American district as the area develops."

(Emphasis added.) Those witnesses said this "could create tension," and "the addition of upscale communities . . . [in currently undeveloped plots] will likely produce an influx of Anglos . . . ."

The obvious point is that the potential new Hispanic and Anglo residents were singled out because of "race for its own sake." Congressman Green, with commendable candor, was sending the message that he did not want more Anglo or Hispanic folks in his district because, being (in his view) different on account of race, they would change the "character" of the district. One shudders to think what the reaction would be if an Anglo legislator had testified that he preferred not to have minority families moving into undeveloped parts of his district because of their "character" or essential "nature."

"Race for its own sake" was also shown in Dallas. As the majority recounts in its Congressional findings (page 375), CD30 African-American Democrat Congresswoman Eddie Bernice Johnson, also with candor, referred approvingly to Black voters who "want to be able to identify some of the people that look like them, that think like them, that live with them, to represent them." "[W]hen they see an opportunity to represent themselves with someone who looks like them, that is what they want . . . ." That is a stark example of "race for its own sake," but it cannot be attributed to the State defendants or their agents.

Back to the law. The issue is whether the Legislature drew lines for reasons of "race for the sake of race" or, instead, for reasons of politics. The issue is complicated, for example, by whether there are limits to non-racial partisan gerrymandering and by the extent to which, if

any, a given record reflects the use of partisanship as a proxy for race.

To analyze this crucial issue, I rely, in part, on a new essay by Professor Richard L. Hasen of the University of California, Irvine School of Law, entitled "Race or Party, Party as Race, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases."[5] Though Professor Hasen zealously advances his policy preferences as an advocate for more aggressive application of the VRA and Equal Protection Clause, his recitation of the law and his analysis of possible outcomes are resourceful and evenhanded.

Professor Hasen discusses what has been called "conjoined polarization," defined as "[t]he more consistent alignment of race, party, and ideology since 1965."[6] Importantly, he acknowledges that "legal doctrine has not yet found a comfortable way to deal with it."[7] Indeed, that is the challenge in the instant case. There are significant clues from various Supreme Court decisions, culminating, as I have said, in *Bethune-Hill*'s reiteration of the "race for its own sake" test. The appeal of this court's ultimate judgment will give the Supreme Court the opportunity to be more precise in explaining—with the 2020 decennial census on the horizon—how much latitude legislatures have to fashion districts for purely

---

[5] Legal Studies Research Paper Series No. 2017–18, preliminary draft, Feb. 6, 2017, forthcoming in William & Mary Law Review (2018) (symposium), abstract available at https://ssrn.com/abstract=2912403.

[6] Hasen, text accompanying note 5 (quoting Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO STATE L.J. 867, 869 (2016)).

[7] *Id.*, text accompanying notes 6–7.

political purposes, to take advantage of earned wins at the ballot box, where racial considerations play a part in the process and where (as always) compliance with the VRA and the Constitution is paramount.

Professor Hasen presents three possible approaches that the Supreme Court could adopt: (1) "race or party"; (2) "party as race"; and (3) "party all the time." Professor Hasen is least fond of the first, although, as I will discuss, that is the exegesis most consonant with Texas's electoral landscape and, more importantly, is the methodology that the en banc Fifth Circuit has announced without using that nomenclature.

For "race or party," "a court's task is to decide whether a case is 'really about race rather than party.'"[8] As Professor Hasen candidly admits, if the task is to decide whether the legislature acted on the basis of race *or* party, redistricting plaintiffs "most importantly"[9] must confront *Easley v. Cromartie*, 532 U.S. 234 (2001). Unaware of Professor Hasen's writings, I nonetheless noted *Cromartie*'s centrality in my congressional dissent, observing that the Court found no error where "the legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliable Democratic voters outside the district."[10]

That is the situation here, which Professor Hasen recognizes but this panel majority does not. He

---

[8] *Id.*, text accompanying notes 7–8.

[9] *Id.*, text accompanying note 36.

[10] *Perez*, 2017 U.S. Dist. LEXIS 35012, at *270 (Smith, J., dissenting) (quoting *Cromartie*, 532 U.S. at 252). Although *Cromartie* is a racial-gerrymandering case, it nonetheless squarely addresses the choice of "race *or* party" in redistricting.

appropriately quotes (but without approval) the State's August 5, 2013, brief in the instant case:

> DOJ's accusations of racial discrimination are baseless. In 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and their redistricting decisions were designed to increase the Republican party's electoral prospects at the expense of the Democrats. It is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.[11]

Professor Hasen seems to acknowledge that, in light of Texas's argument here, *Cromartie* means trouble for the instant plaintiffs. "It is not as though the Court in [*Cromartie*] was unaware of creeping conjoined polarization."[12] "Texas's argument follows a statement [from] the precursor to [*Cromartie*]: '[A] jurisdiction may engage in constitutional political gerrymandering, even if it happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.'"[13]

At least two other binding precedents are steep barriers to these plaintiffs, given the undeniable fact of conjoined polarization in Texas. The first is the Texas redistricting decision in *Bush v. Vera*, 517 U.S. 952 (1996).

---

[11] Hasen, text accompanying note 88 (quoting State's brief at 19).

[12] *Id.*, text accompanying note 37.

[13] *Id.*, text accompanying note 89 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

In what Professor Hasen calls the "principal opinion,"[14] Justice O'Connor boldly stated that "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Id.* at 968 (opinion of O'Connor, J.).

Second is *LULAC v. Clements*, 999 F.2d 831, 854 (5th Cir. 1993) (en banc), in which the Fifth Circuit (by which, as the majority reminds us, we are firmly bound) held that "[Section] 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats." As Professor Hasen explains, "The court pointed to this fact and the support of minority candidates by party members of each party[15]as a reason for treating race and party as separate categories, even while acknowledging that '[m]inority voters . . . have tended to support the Democratic Party.'"[16] Thus, the Fifth Circuit has recognized facts that constitute conjoined polarization in Texas and has squarely adopted the "race or party" approach as the correct methodology: As Professor Hasen explains, "Since . . . *Clements*, conjoined polarization has only increased in the state of

---

[14] *Id.* note 37.

[15] Importantly, several of the districts most hotly disputed in the Texas 2011 redistricting litigation are districts in which the Republicans, in recent elections, have nominated and supported minority candidates. Examples are African-American Republican Congressman Will Hurd in CD23; Hispanic Republican Congressman Francisco Conseco in CD23; Hispanic Republican Representative Aaron Peña in HD41; Hispanic Republican Jose Aliseda in HD35, and Hispanic Republican Representative John Garza in HD117.

[16] Hasen, text accompanying note 74 (quoting *LULAC v. Clements*, 999 F.2d at 854).

Texas, rendering the factual premise that race and party can be separated in Texas more dubious."[17]

In summary, in light of conjoined polarization in Texas, the disjunctive "race or party" formulation is the proper understanding of the law. If that were not otherwise obvious, it is compelled by *Bethune-Hill*, *Easley v. Cromartie*, and *LULAC v. Clements*. But because the judges in the majority seem not to embrace it, I will discuss the other two approaches briefly.

Moving from "race or party," Professor Hasen describes the second approach, "party as race," as "treat[ing] party as a proxy for race, equating proof of discriminatory partisan intent with proof of discriminatory racial intent."[18] We need not dwell for long on this formulation, because "[t]he Fifth Circuit in [*LULAC v. Clements*] . . . rejected the view that partisanship can serve as a proxy for race, viewing partisanship and racial discrimination as two discrete categories."[19] The en banc Fifth Circuit therefore "rejected the argument that 'the Republican and Democratic Parties are proxies for racial and ethnic groups in Texas'" as well as the notion that "'"partisan politics" *is* "racial politics."'"[20] And, as already shown, "'*[p]arty as race*'" [was] denied by the Supreme Court in *Hunt v. Cromartie* . . . ."[21]

---

[17] *Id.*, text accompanying note 75.

[18] *Id.*, text accompanying note 9.

[19] *Id.*, text accompanying note 90.

[20] *Id.*, text accompanying note 71 (quoting *LULAC v. Clements*, 999 F.2d at 860).

[21] *Id.*, text accompanying note 125.

That leaves us with the third explication, "party all the time."[22] It

> deal[s] with the problem of conjoined polarization [by litigating] these cases not as race cases but as party cases, having courts rule that certain partisan actions are themselves illegal. Thus, rather than making partisanship or incumbency protection *a defense* in cases of racial gerrymandering, vote dilution, or vote denial, such conduct would make out a *prima facie case for liability*.[23]

For Professor Hasen, this is admittedly not the law and is only one proposal on an articulately advanced wish list: He acknowledges that under his proposal, "[t]he achievement of partisan ends would not be considered a good reason [for legislative action,] as it appears to be in the redistricting context."[24] As a matter of strategy, "it often will be easier and more fruitful to try to attack the partisanship directly, relying on the racial litigation route only as a backstop."[25]

There would be no need to prolong this discussion of "party all the time," which amounts to "direct policing of

---

[22] It strikes me that "party all the time" might be a good recruiting slogan for a college fraternity. But I digress.

[23] Hasen, text accompanying note 135.

[24] *Id.*, text accompanying note 143 (citation and internal quotation marks omitted). In fairness, I need to add that because of issues regarding judicial manageability, Professor Hasen is "ambivalent" on the efficacy of "party all the time" in redistricting, as distinguished from, e.g., registration and voter ID cases. *Id.*, text accompanying note 147.

[25] Hasen, text accompanying notes 152–153.

partisanship,"[26] except that the majority advances it in one discrete respect. In their opinions in both the 2011 Congressional and 2011 House cases, the judges in the majority exude discomfort with the indisputable fact that the 2011 Republican legislative majority took every possible partisan advantage of the super-majority it gained from the 2010 Republican sweep. The question for this panel is whether that exercise of raw political leverage is lawful, under the VRA and Constitution, even if many might see it as unfair or abusive of power.

I addressed the issue of partisan advantage in my dissent in the 2011 Congressional case. Regarding the Legislature's overt but unsuccessful attempt to unseat longtime Anglo Democrat Congressman Lloyd Doggett in the Austin area, I noted that "[a]n attempt to dislodge an incumbent political adversary should logically be viewed as a permissible redistricting principle," because a party's disadvantaging its political foes, for reasons not related to invidious purposes such as race, is not meaningfully different from the protection of that party's incumbents. *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at *274 (Smith, J., dissenting). The majority disagreed, opining that unseating Doggett "ignor[ed] many if not most traditional redistricting principles." *Id.* at *177 (majority opinion).[27]

---

[26] Hasen, text accompanying notes 148–149.

[27] At least one blogger was alarmed at my suggestion that legislative majorities should be allowed to treat adversaries as adversaries:

> Litigants should challenge the notion that "incumbency protection" includes an interest in "incumbency advantage." Holding otherwise quickly leads to a perverse and startling result. In his *Perez* dissent, for example, Judge Smith argued

In summary, the judges in the majority engage in a well-meaning and unintended misreading of the law. To be fair, there is some residual uncertainty from the Supreme Court's redistricting pronouncements over the past decades. One thing we can be sure of, however, is that as of March 2017, these plaintiffs must show that the legislature employed "race for its own sake." *Bethune-Hill*, 137 S. Ct at 798. The law forbids "the racial *purpose* of state action, not its stark manifestation." *Id.* (emphasis added, citation omitted). "Race for its own sake" must be "the overriding reason for choosing one map over others." *Id.* at 799.

III. The correct law applied to these facts.

It is on this explanation of "race for its own sake," issued by the Supreme Court just a few weeks ago, that the majority fatally stumbles. The majority is right only if

---

that a state's interest in "incumbency protection" implies an interest [in] "incumbency advantage" and, therefore, a constitutional interest in "punishment of enemies [quoting the dissenting passage described above]." Voting rights advocates should forcefully challenge this line of reasoning. This "blood sport republic" logic is fundamentally incompatible with a constitutional framework that demands—at a minimum—a rational basis for state action. The "partisan advantage defense" should not shield racial sorting, and *Cromartie* (and its progeny) should not be extended to condone *illegitimate* uses of political data."

G. Michael Parsons, Is *Bethune-Hill* a Major Voting Rights Victory or the *Next Northwest Austin*?, available at https://moderndemocracyblog.com/2017/03/30/is-bethune-hill-a-major-voting-rights-victory-or-the-next-northwestaustin/. Mr. Parsons, a private attorney/blogger, at least agrees with me that "[i]f anything, *Bethune[-Hill]* took a step backwards" for redistricting plaintiffs. *Id.* n.15.

the State sought, as its ultimate end, not to exploit partisan advantage but, instead, to disadvantage voters (either in part or in whole) because they were members of a racial or ethnic class and were, for that reason, inherently unworthy of equal treatment under the law. By that approach, the State would be treating members of a minority as having a certain identifiable "character," possibly creating "tension," as shown above by the testimony for CD9. By the same notion, per the record quoted above for CD30, if the State had used "race for its own sake," it would have assigned voters together with "people that look like them that think like them, that live with them," instead of doing its best to ascertain voters' political affiliation in order to maintain numerical political hegemony.

The main flaw in the majority's reasoning is that it defies logical explanation. First, the record is absolutely devoid of indication that the Legislature treated race *qua* race; instead, it is replete with examples (possibly hundreds of them) of decisions made, and actions taken, to advance the Republican majority, whether in a quest to retain power for its own sake or to advance policy goals favored by one party and opposed by the other.

Every crime requires a motive. No reason is advanced as to why or how it would have made sense for the legislative majority to disadvantage minority voters because they were minority voters, as the law requires the plaintiffs to show. Nothing in this record reflects partisanship as a proxy for race. If it did, that would mean that the legislators cared less about Republican strength than about racial disparagement—that, in fact, in the 2011 Texas Legislature, political considerations played second fiddle to racial division: The stated objective was partisan

power, but the real and secret goal was subjugation of minorities. It is indeed possible to imagine a world—maybe the Deep South in the 1920s—in which the main guidance for legislative action was racial hatred or prejudice. But to their credit, these private plaintiffs make no such claim, nor do my distinguished colleagues in the majority believe it. This is not "race for the sake of race."

The majority may predictably respond that I have it backwards: that the issue is not whether political party was a proxy for race, but the flipside: whether race was a proxy for partisanship.[28] That is to say, the plaintiffs and the majority seem to take the position that even assuming that the ultimate purpose was the non-invidious goal of maintaining partisan strength, race was often used in drawing lines, in the knowledge that the result of a given boundary change would likely be an increase in Republican electability. Thus, the majority posits that, for example, "turning on racial shading" in the computerized redistricting program is seldom or never acceptable, because race is the hidden reason a particular change (such as breaking a precinct) is made, and though the real and stated goal is purely partisan, the voters left in or out of the precinct are being so treated because of some stereotypical characteristic that is calculated to equate with political party.

The difficulty with this reverse-proxy construct is that it is still not "race for the sake of race." The correct construct is dictated by *Cromartie*, in which such "precinct swapping," 532 U.S. at 257, was center stage. The test is whether the Legislature's decision "is

---

[28] *E.g.*, Majority Op. at 137 ("race as a proxy for partisanship").

unexplainable on grounds other than race." *Id.* at 242 (citations omitted). "Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Id.*

Importantly, in *Cromartie* the Court approved of a precinct split that "plac[ed] the more heavily African-American segment [of the precinct] within [the challenged district]." *Id.* at 248. The Court accepted, with apparent approval, the testimony of a state expert "that African-Americans are more reliable Democrats than whites." *Id.* at 262. And in *Bethune-Hill*, the Court most recently reminds us that instead of focusing on a minuscule change at a precinct boundary, "[t]he ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole . . . . [A]ny explanation for a particular portion of the lines, moreover, must take account of the districtwide context." *Bethune-Hill*, 137 S. Ct. at 800.

In *Cromartie*, "the [Democrat-dominated] legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliable Democratic voters outside the district." *Cromartie*, 532 U.S. at 252. The three-judge district court, agreeing with plaintiffs' expert, declared that "race is the predominant factor." *Id.* at 249. "But this statement of the conclusion is no stronger than the evidence that underlies it." *Id.* "Conclud[ing] that the District Court's . . . findings are clearly erroneous," the Supreme Court reversed. *Id.* at 258. The same should obtain here.

IV. The majority's flawed reasoning.

Faced with its perceived task of deciding whether race predominated in the 2011 Legislature's redistricting decisions, the majority embarks, as I have said, on an impressive recitation of the record. But it gives inadequate nod to legitimate political aims and traditional redistricting principles and, instead, rests much of its decree on finding that various state witnesses presented testimony that it calls "not credible."[29]

The seriousness of the majority's implied allegation cannot be overstated. In its impressively detailed explanation, it weaves a complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive in an effort to achieve their objectives and—by necessary implication—intentionally[30] to deprive minority citizens of their political and civil rights.[31]

A representative example, though by far not the only one, is the majority's critique of the redistricting of House districts touching Nueces County. Here is the plot that the majority uncovered:

> Because Nueces County was less than 50% SSVR, it was mathematically impossible to draw two

---

[29] The majority says "not credible" twenty-seven times (in its Congressional and House opinions and findings/conclusions), an astonishing number of times for a court to find that key witnesses misrepresented material facts under oath. And it finds what it calls "bad faith" nine times.

[30] The majority uses the word "intentionally" approximately one hundred times in the Congressional and House opinions and findings/conclusions.

[31] In its description of the allegedly nefarious enterprise, the majority uses forms of the word "manipulate" about forty-five times.

SSVR-majority districts within the County. However, mapdrawers knew that SSVR was typically lower, than HCVAP, that Nueces County had been over 50% HCVAP in 2000, and that Hispanic population had increased while Anglo population had declined, meaning they had every reason to believe that the HCVAP of Nueces County was over 50% even without more recent HCVAP data.

Moreover, Defendants' assertion that HCVAP data was not available is simply untrue. The HCVAP data was available to mapdrawers by April 21, 2011, before the map went to the floor, and would have shown that Nueces County HCVAP was over 50% .... Nevertheless, Interiano ... and other[s] ... continued to focus solely on SSVR .... [M]apdrawers did not explore whether to include more than two districts in Nueces County .... The ... facts ... concerning the decision to eliminate HD33 in Nueces County demonstrate intentional vote dilution. ... Mapdrawers intentionally did not consider whether § 2 required two districts in Nueces County, and used a false reliance on SSVR and the County Line Rule to justify their refusal to maintain two Latino opportunity districts in Nueces County. Further, they knew that HCVAP was the proper measure for a Latino opportunity district and had HCVAP data available before the map went to the floor, but insisted on using SSVR as the measure because SSVR was lower (and

lower than 50%) and it allowed them to argue that mathematically, two SSVR-majority districts could not be drawn. Although Nueces County was majority HCVAP and had been since at least 2000, they refused to consider whether two HCVAP-majority districts could be drawn wholly within the County. In addition, [they] steadfastly refused to consider whether the County Line Rule might have to yield to maintain two Latino opportunity districts in the area . . . [They] attempted to use § 5 as a shield for their failure to attempt compliance . . . . Mapdrawers chose two districts that were already performing reliably for Latino voters despite being under 50% SSVR . . . and raised their SSVR over 50% . . . . Mapdrawers and redistricting leadership relied in bad faith on a 50% SSVR standard . . . . [M]apdrawers acted in bad faith to thwart such claims by artificially inflating the number of HCVAP-majority districts . . . . [T]hey intentionally used [race] to *undermine* Latino voting opportunity. [M]apdrawers were likely using race to assign population [using ten precinct splits]. [They] intentionally packed Hispanic voters into HD32 to minimize their number and influence in HD34 and protect Hunter. [T]hey targeted low turnout minority areas and intentionally drew out potential Hispanic rivals . . ., again to protect the Anglo incumbent . . . [and] intentionally overpopulated HD32 (and underpopulated . . . HD34), without a legitimate justification.

> [T]he Court finds that redistricters intentionally diluted Latino voting strength by eliminating HD33 in Nueces County. Mapdrawers' use of race in HD90 and HD148 to "offset" this loss was not to comply with the VRA but to intentionally dilute Latino voting strength by (1) allowing redistricting leadership to claim that they were complying with § 5 despite eliminating HD33 and creating no new ability districts; (2) thwarting arguments that § 2 might require additional opportunity districts by artificially inflating the number of Latino-majority districts in the plan; and (3) racially gerrymandering and utilizing population deviations to further dilute the Latino vote in the remaining two Nueces County districts.

Majority opinion at 33–40 (some paragraph breaks omitted). Indeed, this complex conspiracy for Nueces County alone, affecting districts spanning hundreds of miles from Corpus Christi to Dallas/Fort Worth, would make Bernie Madoff proud.

To the contrary, however, if ever traditional districting principles should be respected—as countless Supreme Court decisions say they must—it is in Nueces County. As the majority admits, the County Line Rule and Nueces County are a perfect fit. Because the county proportionally lost population in relation to the rest of the state, it no longer qualifies for 2-plus districts but, by simple math, is entitled to 2.03 representatives. That is as close as it gets. The Legislature accordingly assigned Nueces County exactly two whole seats, and HD33 was sent packing to North Texas.

The only remaining question should be where, within the county, to draw the line between the two so as to comply with one-person-one vote. The majority goes well beyond that by complaining of the removal of HD33 and other ills. An ultimate decision to return CD33 to Nueces County would violate the most perfect fit of that rule in the entire state and would require, at the remedy stage, changes in myriad districts between Nueces County and the new HD33.

And that is just Nueces County. The same apparent perspective—that legislative leaders and staff plotted tirelessly, throughout the legislative session, to obscure the facts and violate the law—infects most of the majority's fulsome explanation.

V. Summary.

The law is, in some respects, unsure. For example, the Supreme Court will need to resolve the circuit split on whether to require coalition districts. And it will have opportunity to tackle the issue of partisan gerrymandering and to explain the limits, if any, to the exercise of partisan advantage. More refinement is needed to inform legislatures how to deal with the Scylla and Charybdis of meeting the requirements of Section 2 of the VRA without undermining equal protection or unduly violating traditional redistricting principles. And some higher court will need to tell this panel whether the 2011 proceedings are moot.

Despite these uncertainties, one thing is certain: Despite its heartfelt efforts, this panel majority has badly overreached in finding that Texas used race, instead of partisan advantage, as the predominant factor in the 2011

redistricting. A finding that racial considerations were "dominant and controlling"[32] defies everything about this record.

Is there anything to show that, as to any district whatsoever, "race was the criterion that, in the State's view, could not be compromised"?[33] Nary a word. I respectfully dissent.

Stay tuned.

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

---

[32] *Miller v. Johnson*, 515 U.S. at 913.

[33] *Bethune-Hill*, 137 S. Ct. at 798.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ; HAROLD DUTTON, JR.; GREGORY TAMEZ; SERGIO SALINAS; CARMEN RODRIGUEZ; RUDOLFO ORTIZ; NANCY HALL and DOROTHY DEBOSE	)	CIVIL ACTION CASE **11-CA-360-OLG-JES-XR** CONSOLIDATED ACTION [Lead case]
Plaintiffs	)	
v.	)	
STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas	)	
Defendants	)	

OPINION

On February 28, 2012, this Court issued PLAN H309 as the interim plan for the districts to be used to elect members in 2012 to the Texas House of Representatives. This opinion explains that plan.

I. Background.

The decennial census was conducted in 2010 pursuant to Article I, § 2 of the United States Constitution and showed that the population of Texas had increased 20.6%, from the 2000 population of 20,851,820 to 25,145,561 for 2010. The population changes mean that the current Texas House districts (the "benchmark plan") are malapportioned and in violation of the one-person, one-vote principle.[1] Thus, the State reapportioned seats. The 82nd Texas Legislature enacted House Bill 150, which implemented a new plan for the Texas House ("the enacted plan") that was signed into law on June 17, 2011.

Plaintiffs mount a number of constitutional and statutory challenges to the enacted plan in this Court under Section 2 of the Voting Rights Act ("the VRA") and the Fourteenth Amendment. The plaintiffs and the United States have also objected to "preclearance" of the enacted plan in the United States District Court for the District of Columbia ("the D.C. Court") under Section 5 of

---

[1] *See Connor v. Finch*, 431 U.S. 407, 410 (1977) (announcing that the constitutional guarantee of one person, one vote requires districts to achieve population equality "as nearly. . . as is practicable") (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Chapman v. Meier*, 420 U.S. 1, 22 (1975)).

the VRA.[2] The State sued in the D.C. Court to obtain preclearance of its enacted plan, and that suit is pending.[3]

Because the enacted plan cannot be implemented, and because the benchmark plan is concededly unconstitutional on account of population growth, this Court is left with the "unwelcome obligation," *Connor*, 431 U.S. at 415, of implementing an interim plan so that the 2012 elections may go forward. The Supreme Court has directed this Court to implement an interim plan by taking guidance from the enacted plan except in geographical areas in which the plan is legally defective. *Perry v. Perez*, 565 U.S.___, 132 S. Ct. 934, 941-42 (2012) (per curiam). Specifically, the Supreme Court has directed this Court to use the State's enacted map and voter tabulation district ("VTD")cuts except in areas in which the plaintiffs have either shown that there is a likelihood of success on the merits on their Section 2 and constitutional claims or that their Section 5 claims are "not insubstantial." *Id.* Accordingly, we analyze the various claims and defenses to the enacted plan under Sections 2 and 5 of the VRA and the Constitution.

---

[2]Texas is subject to the preclearance requirements of Section 5 of the VRA, as amended and codified at 42 U.S.C. § 1973c. Until a state obtains preclearance for such a plan, the plan cannot be effective as law and cannot be implemented. *Clark v. Roemer*, 500 U.S. 653, 646 (1991).

[3]*Texas v. United States*, Civ. Ac. No. 1:11-CV-1303 (D.D.C. 2012).

II. Analysis of Claims.

A. Districts Left Undisturbed from the Enacted Plan.

Following the Supreme Court's direction to leave undisturbed any district that is free from legal defect, *id.* at 941, this Court's interim map for the Texas House configures 122 of the 150 districts in the identical manner as did the Legislature.[4] To the extent that legal challenges are levied against any of those districts, we preliminarily find that any Section 2 and constitutional challenges do not have a likelihood of success, and any Section 5 challenges are insubstantial. Nevertheless, we emphasize the preliminary nature of this order and that, except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters in this case or the case pending in the D.C. Court.

B. Challenges to House District 41.

In Hidalgo County, the plaintiffs in this Court object to the configuration of the districts under one-person, one-vote. In addition, the Department of Justice ("DOJ") and intervenors in the D.C. Court have raised Section 5

---

[4]The districts in the interim plan that are identical to their configuration in the enacted plan are House Districts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 125, 126, 127, 130, 131, 132, 134, 135, 138, 139, 140, 141, 142, 146, 147, and 150.

challenges to House District 41 under theories of retrogression and discriminatory purpose. House District 41, located in Hidalgo County, is represented by a Democrat incumbent (Representative Gonzalez), and neighboring District 40 is represented by a Republican incumbent (Representative Pena), who had switched parties after winning the 2010 election. In an apparent effort to aid Pena's reelection, the State reconfigured HD 41 to take in almost all of the Republican-leaning precincts in the McAllen metropolitan area. More important, Pena's residence was placed in HD 41,[5] and Gonzalez's was put into HD 40, effectively switching their districts. As a result, if Gonzalez were to seek reelection, she would be forced to run in a district that contains only 1.5% of the population she has been representing, and if Pena were to seek reelection, he would run in a district that contains only 1.1% of the district he currently represents.

Most problematic is that enacted HD 41—the only district in Hidalgo County that has a realistic chance of electing a Republican—is substantially underpopulated (by 4.41% from the ideal district size), but the rest of the districts in the county are substantially overpopulated (2.83%, on average).[6] This apparently systematic

---

[5]We sometimes abbreviate references to House districts as "HD xx."

[6]Enacted HD 41 is underpopulated by 7,399 persons, while adjoining Districts 36 and 40 were respectively overpopulated by 4,368 and 5,856. The districts adjoining HD 41, in addition to being more Democrat, are also more heavily Latino. The total Hispanic citizen voting age population ("HCVAP") in HD 41 is 72.1%, while the total HCVAP's in HD 36 and HD 40 are respectively 88.7% and 89.0%. The total Spanish-surname voter registration ("SSVR") in HD 41 is 63%, while the total SSVR's in HD 36 and HD 40 are respectively

overpopulation of Democrat districts and underpopulation of the one possible Republican district presents serious concerns under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd mem. sub nom. Cox v. Larios*, 542 U.S. 947 (2004). Thus, the plaintiffs have a likelihood of success on the merits on their one-person, one-vote claims with respect to HD 41.

Because this Court's interim plan returns HD 41 to a performing ability district, and because it does not incorporate any portion of the State map that is allegedly tainted by discriminatory purpose, this Court need not reach the remaining claims.

C. Challenges to House District 35.

House District 35 in the benchmark plan extended into seven rural counties in South Texas. In the enacted plan, the Legislature reconfigured HD 35 by taking out three of those counties and adding three other rural south Texas counties. The DOJ has alleged in the D.C. Court that enacted HD 35 retrogresses minority voting strength in violation of Section 5. The intervenors further contend that the decision to keep HD 35 in rural South Texas instead of moving it further south to the Rio Grande Valley, an area of fast population growth with a high Latino population, evidences discriminatory purpose under Section 5. Finally, the plaintiffs in this Court allege that the configuration of HD 35 violates Section 2 and reflects intentional discrimination in violation of the Fourteenth Amendment.

85.1% and 85.8%. The total Latino population in HD 41 is 79.8%, while the total Latino population is 93.7% in HD 36 and 94.6% in HD 40.

To support its claim of retrogression, the DOJ cites its expert's conclusion that HD 35 performance was reduced from 40% to 20% in exogenous elections.[7] As further evidence of retrogression, the Department's expert also concludes that under the benchmark plan, HD 35 elected the minority-preferred candidate in 80% of endogenous elections. Because it appears that HD 35 in the enacted plan diminishes the ability of minorities to elect their candidate of choice, the claim of a Section 5 violation is not insubstantial.

This Court need not make a preliminary ruling on the Section 2 and intentional-discrimination claims, because restoring HD 35 to benchmark (or higher) "performance" levels and shifting the district south to the Rio Grande Valley (as plaintiffs requested) provide an appropriate remedy for those claims.

D. Challenges to House District 117.

In the D.C. Court, the DOJ and intervenors lodge Section 5 retrogression and discriminatory purpose objections to the configuration of HD 117. Specifically, they allege that the State intentionally reconfigured the district in an effort to trade mobilized Hispanic voters for Hispanic voters who do not regularly vote. They argue that as a result of these swaps, minorities are no longer able to elect the candidate of their choice.[8]

---

[7]Under the index of the Texas Office of the Attorney General ("the OAG index"), performance decreased from 50% to 40% in exogenous elections.

[8]According to the DOJ's expert, benchmark HD 117 elected the minority-preferred candidate in 60% of endogenous elections. In

In 2010, HD 117 elected a Republican, Representative Garza, to the Texas House of Representatives. To protect him, the Legislature increased the Republican performance of the district. In achieving that end, however, the State may have focused on race to an impermissible degree by targeting low-turnout Latino precincts. Although the HCVAP increased from 58.8% to 63.8%, the SSVR decreased from 50.3% to 50.1%. The fact that the map drawers were able to increase the HCVAP substantially while simultaneously decreasing the proportion of registered voters with Spanish surnames indicates that they may have intentionally focused on precincts with low Latino turnout. This outcome, combined with Garza's statement in his deposition that he "wanted to get more Anglo numbers," is evidence that the decisionmakers were impermissibly focused on race in trying to make the district more Republican. Accordingly, the Section 5 claim is not insubstantial, and the Court has reconfigured HD 117 to return it to benchmark "performance" levels. Because we modify HD 117 to address the Section 5 intentional-discrimination issues, we need not reach the other claims regarding that district.

E. Challenges to House District 33.

The DOJ and intervenors in the D.C. court have objected to the configuration of Nueces County under Section 5. The plaintiffs in this case also raise Section 2 and Fourteenth Amendment objections. Under the 2000

---

exogenous elections, the Department's expert concluded that performance decreased from 60% to 20%. Under the OAG index, performance in exogenous elections decreased from 50% to 20%.

Census, Nueces County had a large enough population for approximately two and a half districts. Because it was not possible to draw two districts wholly within Nueces County without violating one-person, one-vote principles, the benchmark plan included two Latino opportunity districts (HD 33 and HD 34) in its configuration, with the remaining population being shed into HD 32 in San Patricio County.

The 2010 Census revealed, however, that Nueces County, which had a population increase of about 8% over the past decade, grew substantially more slowly than the statewide average of about 21%. Because the Texas House has a static number of seats, that is the electoral equivalent of population loss for the county. As a result, Nueces County's population is currently only 2.02 times the ideal district size, meaning that two districts could be drawn wholly within Nueces County without either breaking the County Line Rule of the Texas Constitution or having impermissibly high population variations in violation of the U.S. Constitution. In other words, and by coincidence, two districts fit almost perfectly into Nueces County, with only a 1% deviation from the ideal size of a House district.

In the enacted plan, the State chose to eliminate one district in Nueces County, HD 33, moving it to Rockwall County in north Texas, which grew by almost 82% over the past decade. Because Nueces County does not have a majority SSVR as a whole, the choice to remove one district required the elimination of one of the Hispanic ability districts.

With regard to the Section 5 claim, any retrogression has been offset in the interim plan by the creation of a new

Hispanic opportunity district, HD 144, which we discuss below.[9] In addition, the Court cannot conclude, at this stage of the proceedings, that plaintiffs are likely to succeed on their Section 2 claim, because they must show that the totality of the circumstances justifies an additional Latino district in Nueces County even if all three *Gingles* preconditions are met. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

Based purely on total population, Nueces County is only entitled to 2.02 districts, and the only way to maintain two Latino districts in Nueces County is to cut a county line in violation of the State constitution. Absent a Section 5 retrogression violation, this seems inappropriate in the particular circumstances of this case. This is not to say that Section 2 of the VRA could never require a county line cut. This Court can envision a situation in which the refusal to cut a county line could, even in the absence of discriminatory purpose, result in vote dilution. However, in the particular circumstances of this case, traditional redistricting principles counsel in favor of maintaining two districts in Nueces County.

F. Challenges to House District 144.

Located in far eastern Harris County, the benchmark HD 144 was an Anglo-citizen majority district with a large and growing Hispanic population (35% HCVAP). Indeed, the Hispanic population across Harris County has

---

[9]To the extent any of the intervenors raises a Section 5 challenge in the D.C. Court based on discriminatory purpose, this Court is unable to conclude, based on the evidence presented, that any intervenor has met the standard imposed by the Supreme Court.

increased significantly over the previous decade, while the Anglo population has declined. In the enacted plan, the State adjusted HD 144 in a manner that reduced the HCVAP to 31%, thus likely making the district safer for its Republican incumbent, Representative Legler. The plaintiffs allege that Section 2 required the State instead to reconfigure HD 144 so that it would contain a majority HCVAP such that Hispanics will have the opportunity to elect the candidate of their choice.

The Court concludes that the plaintiffs have demonstrated a likelihood of success on the merits of their Section 2 claim in eastern Harris County. First, the plaintiffs presented numerous demonstration maps to this Court, and during the legislative session, illustrating that an additional compact majority HCVAP district is possible in eastern Harris County. Second, the plaintiffs have submitted a number of expert reports analyzing whether racially polarized voting exists in Texas, and also specifically whether it exists in Harris County. Based on these reports and on the testimony of the plaintiffs' experts, the Court concludes that the plaintiffs have preliminarily established that racial block voting and cohesive voting patterns exist in Harris County.

Finally, the Court preliminarily concludes that the creation of a new Latino district in eastern Harris County is justified by the totality of the circumstances. Over the past 10 years, minority growth in Harris County has increased by over 700,000, while Anglo population decreased by more than 82,000. Latinos constitute 23% of the citizen voting age population ("CVAP") in Harris County but are the voting majority in only 17% of the districts in the enacted plan. Moreover, a significant

amount of evidence was presented to the Court regarding historical racial discrimination in Texas. For these reasons, the Court concludes that the plaintiffs have shown a likelihood of success on their claim that Section 2 requires the creation of a Latino opportunity district in eastern Harris County.

This Court has reconfigured HD 144 in the same general manner as the plaintiffs request. The Court's configuration also offsets the elimination of a minority-opportunity district in Nueces County. *See Texas v. United States*, 2011 WL 6440006, at *17 (D.D.C. Dec. 22, 2011) (indicating that new ability districts may offset any lost ability districts).

G. Challenges to House District 149.

Based purely on population, Harris County is entitled to 24.4 districts; but, in the benchmark map Harris County had 25 districts, which was purportedly the result of a legislative compromise to allow for greater minority representation. The enacted plan reduced the number of districts to 24. The Legislature chose to dismantle HD 149, represented by Democrat Representative Vo, the first and only Vietnamese-American legislator in the Texas House. His residence was placed in HD 137, a minority coalition district represented by fellow Democrat Representative Hochberg. The new HD 149 was moved to fast-growing Williamson County, in central Texas, in the enacted plan.[10] As a result, enacted HD 149 does not allow minorities the ability to elect the candidate

[10]Over the last decade, Texas grew by 20.6%, Harris County by 20.3%, and Williamson County by 69.1%.

of their choice. The plaintiffs contend that the change violates Section 2 of the VRA and the Fourteenth Amendment. The DOJ and intervenors also raise Section 5 retrogression and discriminatory purpose challenges in the D.C. case.

It is difficult to imagine a legislative district more diverse than what HD 149 was in the benchmark plan: a CVAP of 38% Anglo, 26% Black, 19% Hispanic, and 16% Asian. Voters and political activists residing in benchmark HD 149 testified that a coalition of voters from all four major ethnicities in the district worked together to elect Vo in 2004 and to reelect him since. Because Vo is likely the minority candidate of choice of one or more minorities in benchmark HD 149, the district could be considered either a "coalition district" or a "crossover" district. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). The D.C. Court has indicated that Section 5 protects such districts from retrogression, *Texas v. United States*, 2011 WL 6440006, at *18-19, so the Section 5 case with respect to HD 149 and its effect on statewide retrogression is not insubstantial. As a result, we make no determination with respect to the other claims as to HD 149.

H. Challenges to House Districts 77 and 78

In El Paso County, the intervenors[11] in the D.C. Court have alleged that the line between HDs 77 and 78 was drawn with discriminatory purpose. The plaintiffs in this Court also allege that the El Paso configuration violates

[11]The DOJ expressed its opinion during this Court's February 14, 2012, hearing that the intervenors' discriminatory purpose claim for El Paso is not insubstantial.

Section 2 of the VRA and is intentionally discriminatory under the Fourteenth Amendment. That line is indeed bizarre, even for a legislative district. District 77 has two "deer antler" protrusions that reach into HD 78 and grab predominantly Latino neighborhoods. The protrusions have the effect of concentrating Latinos into District 77, protecting a Latino Republican incumbent, Representative Margo, in District 78.

Although it is difficult to tell whether those lines were drawn on partisan or racial lines, the high number of split precincts in the protrusions increases the likelihood that the map-drawers were focused on race because partisan voting data are not available below the precinct level. The State has not offered any explanation why the precincts were split, so we conclude that plaintiffs have presented a Section 5 claim that meets the low "not insubstantial" standard. Because the court-ordered remedy with regard to the Section 5 discriminatory purpose claim also provides an appropriate remedy for the alleged Section 2 and Fourteenth Amendment violations, the Court need not reach those issues.

III. The Interim Texas House Plan.

In summary, this Court's plan, H309, obeys the Supreme Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced. In the interim plan, we correct those perceived defects by taking guidance from the State's valid political considerations as reflected in the enacted plan. *See Perez*, 132 S. Ct. at 941.

In South Texas, H309 equalizes the population deviations in Hidalgo County while restoring HD 41 largely to its benchmark configuration, making necessary adjustments resulting from population shifts. This Court's interim plan also moves HD 35 from rural South Texas into the Rio Grande Valley, where it will be a performing minority ability district. In Harris County, HD 149 is restored, and in its stead, HD 136, a 75% Anglo district represented by retiring Republican Representative Woolley, is moved to another part of the state. Further, any changes in this area are made so as to not affect the ability of minorities in neighboring districts, such as HD 137, to elect the candidate of their choice. On the east side of Harris County, HD 144 is substantially reconfigured so that it contains a majority HCVAP and is likely to elect the Latino candidate of choice. Finally, in El Paso County, the Court addresses the intentional discrimination allegation by retracting HD 77's "antlers" somewhat, making the districts more compact. The effect is to increase District 78's HCVAP to 58.3% and to provide minorities the ability to elect the candidate of their choice.

All other districts in the enacted plan are unchanged unless an alteration is required by changes to adjoining districts. Thus, in sum, 122 districts in this Court's interim plan are exactly the same as those in the enacted plan; 7 districts have been altered minimally; and 21 districts have been altered substantially.

IV. Conclusion.

We emphasize the preliminary and temporary nature of the interim plan, ordered in adherence to the standards

set forth by the Supreme Court in this very case, as we undertake our "unwelcome obligation"[12] mindful of the exigent circumstances created by the need for timely 2012 primaries and general elections in Texas. Nothing in this opinion explaining this Court's independently drawn PLAN H309 represents a final judgment on the merits as to any claim or defense in this case.

It is hereby ORDERED that Plan H309 be used on an interim basis as the redistricting plan for the 2012 elections for the Texas House of Representatives.

SIGNED on this 19th day of March, 2012.

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

/s/
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

---

[12] *Perez*, 132 S. Ct. at 940 (quoting *Connor*, 431 U.S. at 415).

APPENDIX E

In the United States District Court for the Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN C235

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

This Order addresses Plaintiffs' statutory and constitutional claims against Plan C235, enacted by the 83rd Texas Legislature in 2013.

The following Plaintiffs assert claims against Plan C235 in this consolidated case: the Mexican American Legislative Caucus ("MALC"),[1] the NAACP Plaintiffs,[2]

---

[1] MALC is a non-profit Latino legislative caucus established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas. Docket no. 897 ¶ 18. MALC-1 is a list of current MALC members.

[2] The NAACP Plaintiffs include the Texas State Conference of NAACP Branches, an association of local chapters of the NAACP, Howard Jefferson, and Rev. Bill Lawson. Individual Plaintiff Juanita Wallace passed away in 2016. According to the affidavit of Carmen Watkins, Regional Director for Region VI of the National NAACP, the Texas NAACP has well over 10,000 members and members who are registered to vote in almost every county. NAACP-1. She further

the African-American Congresspersons Plaintiffs,[3] the League of United Latin American Citizens ("LULAC") Plaintiffs,[4] the Rodriguez Plaintiffs,[5] the Quesada

---

attests that "the NAACP has at least one branch in each of the implicated counties," 884 members in Tarrant County, 320 members in Bell County, 1,232 members in Harris County, and 147 members in Fort Bend County. *Id.* She further states that she reviewed the official membership lists in each of those counties and determined that there are members who reside in CD9, CD18, CD30, CD33, and House districts 100, 109, 110, and 111 (Dallas County), 95 and 101 (Tarrant County), 54 and 55 (Bell County), and 26 and 27 (Fort Bend County). *Id.*

[3] Eddie Bernice Johnson (CD30), Sheila Jackson Lee (CD18), and Alexander Green (CD9).

[4] The LULAC Plaintiffs include LULAC and individual members Gabriel Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, and Patricia Mancha. LULAC has members who are registered to vote in most counties in Texas, including Dallas, Tarrant, Harris, Bexar, Nueces, and Fort Bend Counties. Docket no. 1302-1. LULAC submitted the affidavit of Elia Mendoza, Texas LULAC State Director, who attested that "there are multiple members of LULAC who are eligible voters in each of the Congressional and State Legislative Districts involved in this litigation." *Id.*

[5] Eddie Rodriguez, Milton Gerard Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Jose Martinez, Nina Jo Baker, Travis County, and the City of Austin.

The LULAC Plaintiffs, Perez Plaintiffs, and Rodriguez Plaintiffs have submitted joint briefing as "Joint Plaintiffs" on the congressional plan. Accordingly, the Court will consider their claims together unless necessary to consider them individually. The Perez Plaintiffs include Shannon Perez, Gregory Tamez, Sergio Salinas,

Plaintiffs,[6] and Congressman Henry Cuellar.

Plaintiffs assert statutory claims under § 2 of the Voting Rights Act ("VRA") and constitutional claims under the Fourteenth and Fifteenth Amendments to the United States Constitution.

Procedural History and Background

Plaintiffs initially filed several lawsuits in 2011 challenging Plan C185 and Plan H283 enacted by the 82nd Legislature, and the various cases were consolidated. At the time, Texas was subject to preclearance requirements under § 5 of the VRA, and Texas filed a simultaneous action seeking preclearance in the United States District Court for the District of Columbia—*Texas v. United States*, No. 11-1303 (D.D.C).[7] Plaintiffs presented numerous claims in this Court under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and raised numerous challenges to the plans in the related preclearance litigation in the District of Columbia. The D.C. Court held a trial in January 2012 but had not yet issued a ruling in February 2012.

Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, and TJ Carson.

[6] Margarita V. Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, and Sandra Puente.

[7] Texas could have sought administrative preclearance by the Attorney General, but instead sought a declaratory judgment from the D.C. District Court. In *Texas v. United States*, Texas bore the burden of proving that its enacted plans had neither the effect nor the purpose of abridging minority voting rights. 887 F. Supp. 2d 133, 139 (D.D.C. 2012) (citing 42 U.S.C. § 1973c(a)).

Faced with impending election deadlines and unprecleared plans that could not be used in the election, this Court was faced with the "unwelcome obligation" of implementing interim plans so that the primaries could proceed. *See* docket no. 690 at 2 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). This Court considered compromise plans (Plan C226 and Plan H303) proposed by certain parties. Although the plans were supported by some parties, including Defendants, most parties contended that they maintained statutory and constitutional infirmities challenged in Plan C185 and Plan H283. The Court adopted Plan C235 (which was Plan C226 as modified for purely technical reasons) and Plan H309, a plan similar to Plan H303 but with changes in Harris County, Bexar County, Webb County, and Nueces County.

This Court found that adoption of these plans as the interim plans for the 2012 elections was consistent with the deferential standards set forth in *Perry v. Perez*, 565 U.S. 388 (2012) and would significantly benefit the voters, candidates, election administrators, counties, and political parties. Docket nos. 690, 691. The Court noted that its analysis had been expedited and curtailed and that it had been able to make only preliminary conclusions that might be revised upon full analysis. Docket no. 690 at 3 ("[W]e emphasize the preliminary nature of this order and that, except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters in this case or the case pending in the D.C. Court."); docket no. 691 at 1 (noting that "this interim map is a

result of preliminary determinations" and "is not a final ruling on the merits of any claims").

As directed by the Supreme Court, this Court in adopting an interim map attempted to determine which claims pending in the D.C. Court preclearance litigation were "not insubstantial" because the D.C. Court had exclusive jurisdiction over the § 5 claims but had not yet ruled. That Court issued its decision denying preclearance of Plan C185 and Plan H283 on August 28, 2012. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). The panel majority found that Plan C185 increased the "representation gap" from three districts to four districts[8] and thus increased the degree of discrimination and was retrogressive. Because the panel did not agree on the appropriate rationale for finding retrogression, they considered the issue of discriminatory intent and unanimously found that "the plan was enacted with discriminatory purpose." *Id.* at 159. The Court specifically noted that unnecessary changes were made to the three African-American ability districts that raised serious concerns about what motivated the Congressional plan, and that Texas failed to explain the changes as anything other than "coincidence." *Id.* at 159-61.

With regard to Plan H283, the D.C. Court found that it would have the effect of abridging minority voting rights in benchmark ability districts 33, 35, 117, and 149, and that Texas did not create any new ability districts to

---

[8] Minority representation fell from 10/32 ability districts (when proportionality would be 13/32) to 10/36 ability districts (when proportionality would be 14/36), thus increasing the representation gap from three districts to four.

offset those losses. Accordingly, the plan was retrogressive and could not be precleared.

Having found retrogressive effect, the D.C. Court did not need to reach whether Plan H283 was drawn with a discriminatory purpose, but it did "note record evidence that cause[d] concern." 887 F. Supp. 2d at 177. This evidence included that the process for drawing the plan "showed little attention to, training on, or concern for the VRA" and the failure to create any new minority ability districts among 150 relatively small House districts despite the dramatic Hispanic population growth concentrated primarily in three geographic areas. *Id.* at 177-78. The D.C. Court further stated, "These concerns are exacerbated by the evidence we received about the process that led to enacted HD 117," specifically that "mapdrawers modified HD 117 so that it would elect the Anglo-preferred candidate yet would look like a Hispanic ability district on paper," showing "a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote." *Id.* at 178 (emphasis in original).

The D.C. Court also found incredible the testimony of primary House mapdrawer Gerardo Interiano that he was unaware of the capability of Texas's redistricting software (RedAppl) to display racial data at the census block level, which reinforced evidence suggesting that mapdrawers split voter tabulation districts ("VTDs") along racial lines to dilute minority voting power. *Id.* The D.C. Court concluded,

> This and other record evidence may support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this

> issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental.

Id. Texas appealed the D.C. Court's decision denying preclearance to the Supreme Court.

The Court's interim maps, H309 and C235, were used for elections in 2012. Despite urging from the Texas Attorney General to adopt the Court's interim maps during the regular session in 2013,[9] the Texas Legislature's regular session ended in May 2013 with no redistricting action. However, Governor Rick Perry called a special session directing the Legislature to consider "legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." D-684.

The Legislature reconvened and undertook this redistricting task. During the special session, some changes were made to Plan H309, and it was adopted as Plan H358. By June 23, 2013, the Legislature had passed SB3 and SB4 to enrollment. SB4 "ratified and adopted" this Court's interim congressional map, Plan C235, without change, and repealed SB4 from the 2011 first special session, which had adopted Plan C185. SB3 adopted Plan H358 as the plan for the Texas House of Representatives and repealed HB150 from the 2011

---

[9] *See* Quesada-57 (Attorney General Greg Abbott letter to Speaker Straus urging the Legislature to adopt the interim maps during the session).

regular session, which had adopted Plan H283. SB3 and SB4 were sent to the Governor on June 24, 2013.

On June 25, 2013, while Texas's appeal of the D.C. Court's decision was pending, the United States Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), holding that the § 4(b) coverage formula of the VRA that determined which jurisdictions were subject to § 5 preclearance was unconstitutional. Accordingly, Texas was no longer automatically subject to preclearance requirements. The Governor signed SB3 and SB4 on June 26, 2013.[10]

On June 27, 2013, the Supreme Court vacated the D.C. Court's judgment and remanded for further consideration in light of its intervening decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and the suggestion of mootness filed by defendant Wendy Davis. *Texas v. United States*, 133 S. Ct. 2885 (June 27, 2013). On remand, the D.C. Court dismissed the preclearance litigation as moot.[11]

On June 28, 2013, Defendants filed a motion to dismiss for lack of subject matter jurisdiction (docket no. 768) in this case, arguing that the case had become moot and should be dismissed. This Court held a status conference

---

[10] The 2013 plans for the Texas House and U.S. House became law on September 24, 2013. *See* TEX. CONST. ART. III § 39.

[11] Although the Supreme Court did not rule on § 5 itself, the effect of its ruling was to release Texas from the preclearance requirement and render the D.C. preclearance proceedings moot. On remand, Texas moved to dismiss the case as moot, and the United States did not oppose the motion. Some defendants in the case sought leave to amend to assert counterclaims for relief under § 3(c) of the VRA. On December 3, 2013, the D.C. Court granted Texas's motion to dismiss proceedings in that court and denied the motions to amend.

on July 1, at which Plaintiffs expressed a desire to amend their complaints to challenge the 2013 plans, and some Plaintiffs stated their intent to amend their existing claims related to the 2011 plans to seek relief under § 3(c) of the VRA.[12] After the hearing, the Court issued an order summarily denying the motion to dismiss for lack of jurisdiction without prejudice (docket no. 771) and issued an order directing Plaintiffs to file motions for leave to amend pleadings.

Plaintiffs filed their motions, and the State responded in opposition and with a motion to dismiss as moot all claims related to the 2011 plans. This Court entered an order on September 6, 2013 on the pending motions (docket no. 886) permitting Plaintiffs to amend their claims with regard to the 2011 plans to assert requests for equitable relief under § 3(c) and to assert claims against the 2013 plans. The Court rejected Defendants' mootness argument, for the reasons explained in that Order and in docket no. 1104. In sum, this Court found that the claims against the 2011 plans C185 and H283 were not moot because Plaintiffs alleged that they were continuing to be harmed by the Legislature's actions in enacting Plan C185

---

[12] Section 3(c), known as the VRA's "bail-in" provision, states, "If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period [may impose preclearance requirements]." 52 U.S.C. § 10302(c) (formerly 42 U.S.C. § 1973a(c)).

and Plan H283, Texas had refused to concede any of Plaintiffs' claims, and Plaintiffs had alleged claims for which meaningful relief was available. The Court further ordered that the 2013 enacted plans, C235 and H358, be used for the 2014 elections.

Thereafter, Plaintiffs filed their amended complaints. Plaintiffs generally maintained their claims against Plan C185 and Plan H283 and sought relief under § 3(c) of the VRA. Most Plaintiffs amended their Complaints to assert claims against Plan C235. Specifically, Congressman Cuellar filed a Second Amended Complaint in Intervention (docket no. 893) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; LULAC filed a Third Amended Complaint (docket no. 894) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Rodriguez Plaintiffs filed a Second Amended Complaint (docket no. 896) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Quesada Plaintiffs filed a Third Amended Complaint (docket no. 899) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the NAACP filed a Third Amended Complaint (docket no. 900) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the African-American Congressperson Intervenors filed a Second Amended Complaint (docket no. 901) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Constitution; and

MALC filed a Third Amended Complaint (docket no. 897) asserting claims under § 2 of the VRA.

Some Plaintiffs also amended their complaints to assert claims against Plan H358: the Task Force filed a Fourth Amended Complaint asserting statutory and constitutional claims based on changes to HD90 from the Court's interim plan (docket no. 891); MALC asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 897); the NAACP asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 900); and the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and those claims were joined by LULAC.

The Texas Latino Redistricting Task Force and the United States did not assert claims against Plan C235, and the Task Force claims are limited to HD90 in Plan H358. The Texas Democratic Party ("TDP") and Gilberto Hinojosa filed a First Amended Cross-claim (docket no. 902) to assert partisan gerrymandering claims under the Equal Protection Clause and the First Amendment against the 2013 plans. Individual Plaintiff John Morris also asserted partisan gerrymandering claims against Plan C235 (docket no. 784). This Court granted Defendants' motion to dismiss the political gerrymandering claims against the 2011 and 2013 plans in docket no. 886 and docket no. 1104, and thus all of TDP's and Morris's claims were dismissed. The Court also granted summary judgment on the Fifteenth Amendment claims against the 2011 and 2013 plans in docket no. 275 and docket no. 1108. *See* docket no. 1387.

This Court held a trial on Plan H283 in July 2014 and on Plan C185 in August 2014 and later issued extensive fact findings and rulings on Plaintiffs' claims. The Court found that certain aspects of those plans violated § 2 of the VRA and the Fourteenth Amendment. Docket no. 1365 (Order on Plan H283); docket no. 1364 (Fact Findings related to Plan H283); docket no. 1390 (Amended Order on Plan C185); docket no. 1340 (Fact Findings).[13]

Plaintiffs contend that certain aspects of Plan C185 and Plan H283 that the Court found to be the product of discriminatory intent or constitutional and statutory violations were maintained in Plan C235 and Plan H358, rendering them infirm. In addition, Plaintiffs bring various statutory and constitutional challenges against Plan C235 and Plan H358. This Court held a trial on Plan C235 and Plan H358 in July 2017 and now issues rulings on Plaintiffs' claims against Plan C235.

I. Legal Standards

At this stage, this case involves claims under § 2 of the VRA and the Fourteenth Amendment. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). Under § 2, Plaintiffs assert both "results" vote dilution and intentional discrimination/vote dilution claims. Under the

---

[13] Judge Garcia and Judge Rodriguez adopt the prior fact findings and opinions and incorporate them into this Order because they are relevant to the 2013 plan claims. In this Order, Judge Smith agrees that the Court's orders on the 2011 plans are law of the case. The findings and conclusions in this order are therefore not inconsistent with what this district court panel has already decided.

Fourteenth Amendment, Plaintiffs assert both intentional discrimination/vote dilution and *Shaw*-type racial gerrymandering claims. The Court discussed these claims previously in its decisions on the 2011 plans, and will briefly summarize the applicable standards here.

A. § 2 of the Voting Rights Act

Section 2 of the VRA "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (internal quotations omitted). In its current form, § 2(a) provides that no voting standard, practice, or procedure "shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b)." 52 U.S.C. § 10301(a). Under section 2(b), a state violates § 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by [§ 2(a) of the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 prohibits all race discrimination in voting,[14] but claims under § 2 generally assert vote denial or vote dilution injuries.

---

[14] *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).

The Supreme Court held in *Mobile v. Bolden*, 446 U.S. 55 (1980),that a race-based vote dilution claim under the Fourteenth Amendment required racially discriminatory intent, not simply dilutive results.[15] In passing the 1982 amendments to the VRA, Congress reacted to that decision. *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1021 (5th Cir. 1984). As the Fifth Circuit noted in *LULAC v. Clements*, 999 F.2d 831, 849-51 (5th Cir. 1993), "the 1982 Amendments [to § 2] 'codify' the 'results test' articulated in" constitutional voting discrimination cases prior to *Mobile v. Bolden*, making clear that a § 2 violation could be proved without discriminatory intent.[16] However, the Legislative history of § 2 and case law also make clear that voters may bring a claim based on discriminatory voting practices using either the results test or an intentional discrimination test.[17] The Senate Report further states

---

[15] *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose.").

[16] The Supreme Court noted in *Gingles* that the Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to *Mobile v. Bolden* and that in pre-*Bolden* cases such as *White v. Regester* plaintiffs could prevail by showing that, under the totality of circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. *Gingles*, 478 U.S. at 44 n.8; *see also Jones v. City of Lubbock*, 727 F.2d 364, 379 (5th Cir. 1984) (the amended § 2 codifies pre-*Bolden* vote dilution law).

[17] S. REP. NO. 97-417 ("The Amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the

that, if a § 2 plaintiff chooses to prove discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" would be relevant evidence of intent. *McMillan*, 748 F.2d at 1046-47 (quoting S. REP. NO. 97-417 at 27 n.108).

1. Results Claims

As noted, Congress amended § 2 of the VRA in 1982 "to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis in original). Such results claims are governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Gingles* identified three threshold conditions for establishing a § 2 results violation: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a

---

challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.") (footnote omitted); *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) ("To violate the statute, however, these practices must be undertaken with an intent to discriminate or must produce discriminatory results."); *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) ("[A]fter the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes."); *McMillan v. Escambia Cty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984) ("Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.")(emphasis in original).

single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). A minority population (either singly or combined in coalition with other minorities[18]) is sufficiently large when it constitutes greater than 50% of the citizen voting age population of the district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999). Because the decennial census data does not include CVAP data, the Court has instructed the parties to use the five-year 2011-2015 ACS survey data to best approximate the CVAP in 2013, when the maps were enacted.[19]

---

[18] As discussed at length in the Court's opinion on plan H283 (and not repeated here), the Court finds that § 2 can require the creation of coalition districts.

[19] Because the § 2 results test is concerned only with whether the districting scheme *results* in vote dilution, and not the Legislature's knowledge or intent, *Shaw*, 509 U.S. at 641, the Court has concluded that evidence that best reflects the population at the time of redistricting should be considered to determine whether vote dilution resulted from the districting plans, regardless of whether the

Generally, to evaluate § 2 results claims, it must be determined how many "reasonably compact districts" exist in the enacted plan, and whether Plaintiffs have demonstrated that more were required, which is usually done through presentation of demonstration maps. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("*De Grandy* requires a comparison between a challenger's proposal and the 'existing number of reasonably compact districts.'"). When evaluating compactness, the Court focuses on the compactness of the minority population (in terms of its size and concentration), not the compactness of the contested district or necessarily the precise shape of its boundaries, though the shape of the district is relevant insofar as it provides evidence concerning the compactness of the minority population. *LULAC v. Perry*, 548 U.S. 399, 433 (2006); *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995).[20]

If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district, and a district that reaches out to grab small and apparently isolated minority communities is not reasonably compact. *Bush v. Vera*, 517 U.S. 952, 979 (1996); *LULAC*, 548 U.S. at 432. However, members of a

---

evidence or data was available to the Legislature at the time of redistricting.

[20] In its most recent decision, the Supreme Court phrased the requirement as being that the minority population must be sufficiently large and geographically compact to constitute a majority "in some reasonably configured legislative district." *Harris*, 137 S. Ct. at 1470.

racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity." *LULAC*, 548 U.S. at 435. "A district would not be sufficiently compact if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 737-38 (S.D. Tex. 2013) (citing *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 96 (5th Cir. 1994) (noting that "[a] number of courts have concluded that the first *Gingles* precondition is not satisfied if the proposed district does not retain a natural sense of community such that it can be effectively represented")).

Further, the § 2 compactness inquiry must take into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wa. 2014) ("The compactness inquiry under § 2 . . . focuses more generally on whether the proposed minority district reasonably comports with 'traditional districting principles' such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents."). "The recognition of nonracial communities of interest reflects the principle that a State may not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotations and alterations omitted).

Thus, to evaluate compactness, the Court considers the dispersion of the relevant minority population, the shape of the proposed district (as measured by a visual evaluation and by statistical measures of compactness) and the causes underlying its shape, and the district's compliance with traditional redistricting principles (such as respect for communities of interest and traditional boundaries). *See Rodriguez*, 964 F. Supp. 2d at 737-54; *see also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting that a district's compactness must be a relative measure based on location and population density and that "[i]n a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).[21]

The second and third *Gingles* preconditions are referred to collectively as "racially polarized voting." Defendants conceded the existence of racially polarized voting across Texas, except in Nueces and Kleberg Counties, in terms of the fact that minority voters and Anglo voters tend to vote differently. The fact that minority voters and Anglo voters tend to support

---

[21] If the proposed demonstration district is bizarrely shaped because the minority population within it is not reasonably compact, then § 2 generally will not require the district. However, § 2 does not require compact districts, and bizarre shape may be the result of non-racial factors such as geographical constraints and respecting precinct and city boundaries. Thus, the shape of the district is relevant, but the Court must examine the reasons for the district's shape.

different candidates in Texas is essentially undisputed and is supported by all the expert testimony in the case, regardless of the methodology used (except with regard to Travis County).[22] However, Defendants dispute whether such racially polarized voting is legally significant in terms of the degree of minority cohesion and Anglo crossover voting, and in terms of whether such racially polarized voting is the result of race as opposed to politics.[23]

---

[22] Racial bloc voting and minority-group political cohesion never can be assumed, but must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (citing *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). However, there is ample evidence in the record to support Defendants' concession, at least concerning Latino voter cohesion, African-American voter cohesion, and Anglo bloc voting. Defendants do not concede that minority voters are cohesive

[23] In this regard, Defendants rely on the Fifth Circuit's decision in *LULAC v. Clements*, 999 F.2d 23 831, 850 (5th Cir. 1993) (en banc), in which the court accepted the argument that "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens," vote dilution is not "on account of race or color" as required by the VRA. The court noted that the question was "not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *Id.* The district court held that plaintiffs "need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting." *Id.* Defendants argued that the district court erred in refusing to consider the nonracial causes of voting preferences they offered. The Fifth Circuit agreed, holding that "[i]n holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat," in

If all three *Gingles* preconditions are satisfied, § 2 requires consideration of the "totality of circumstances" to determine whether members of a racial group have less opportunity than do other members of the electorate. *LULAC v. Perry*, 548 U.S. 399, 425-26 (2006). The Supreme Court has referred to the Senate Report on the 1982 amendments to the VRA, which identifies factors typically relevant to a § 2 claim, including:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 426 (quoting S. REP. NO. 97-417 at 117,206). The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized

---

violation of *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and the consensus of a majority of justices in concurring opinions in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (specifically Justices Powell, Rehnquist, O'Connor, Burger, and White). *Clements*, 999 F.2d at 850-51.

needs of the members of the minority group, and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous, may have probative value. *LULAC*, 548 U.S. at 426.

Last, although § 2 does not guarantee proportional representation, proportionality—whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area—is always a relevant consideration. *LULAC*, 548 U.S. at 426; *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

2. § 2 Intentional Discrimination/Intentional Vote Dilution

As discussed in this Court's opinion on Plan C185, the Supreme Court has declined to decide whether the *Gingles* preconditions apply to intentional vote dilution/discrimination claims under § 2. Docket no. 1390 at 116 ("[T]he Supreme Court expressly stated in *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009), that it did not consider 'whether intentional discrimination affects the *Gingles* analysis' and that its holding (setting forth the majority-minority requirement to satisfy the first *Gingles* factor for a § 2 results claim) 'does not apply to cases in which there is intentional discrimination against a racial minority.'"). This Court previously concluded that Plaintiffs are not required to satisfy the first *Gingles* precondition to prove discriminatory racial gerrymandering and intentional vote dilution, but that the other § 2 factors, including the existence of racially polarized voting and the totality of circumstances, remain

relevant to such claims. Docket no. 1390 at 118. The ultimate § 2 inquiry remains whether minority voters have less opportunity to participate in the political processes and to elect candidates of their choice. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

Further, the rubric for analyzing discriminatory purpose under § 2 is the same as under the Equal Protection Clause of the Constitution. Discriminatory intent is shown when racial discrimination was a motivating factor in the governing body's decision to adopt or maintain a voting practice or procedure. *Brown*, 561 F.3d at 433 ("Under the intent-based approach, '[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act' for a violation [of § 2] to occur.")[24]; *Garza*, 918 F.2d at 766 ("To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.").

---

[24] In *United States v. Brown*, the Fifth Circuit noted that the Senate factors supply a source of circumstantial evidence regarding discriminatory intent, as do the factors set forth in *Arlington Heights*. 561 F.3d at 433. As this Court previously concluded, these factors are a relevant source of evidence to be considered as part of the totality of circumstances. However, discriminatory results remain insufficient by themselves to establish discriminatory intent. *Mobile*, 446 U.S. at 71 n.17 ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite or,' its adverse effects upon an identifiable group.") (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

B. Fourteenth Amendment claims

Plaintiffs bring two types of claims under the Equal Protection Clause of the Fourteenth Amendment, the central purpose of which "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). The first claim is a racial discrimination claim, which requires racially discriminatory intent and discriminatory effect. The second claim is a *Shaw*-type racial gerrymandering claim, the essence of which is that mapdrawers have separated voters into districts on the basis of race, and which does not require racially discriminatory intent.[25]

1. Intentional Racial Discrimination/Intentional Vote Dilution

Legislative apportionment schemes may violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotations omitted) (affirming district court's finding that at-large voting scheme, although racially neutral when adopted, was being maintained for the invidious purpose of diluting

---

[25] *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (noting that a *Shaw*-type claim is "analytically distinct" from a vote dilution claim because a vote dilution claim "alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race[, while] the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts" regardless of motive) (internal citations omitted).

the voting strength of the black population).[26] A showing of racially motivated discrimination is a necessary element for a successful claim of unconstitutional vote dilution under the Fourteenth Amendment. *Reno v. Bossier Barish Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)).

Discriminatory intent need not be proved by direct evidence. *Rogers*, 458 U.S. at 618. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* (quoting *Arlington Heights*, 429 U.S. at 265)[27]. Determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.*

Courts should look to the Supreme Court's decision in *Arlington Heights* for guidance in analyzing whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking. *Bossier Parish*, 520 U.S. at 488. The important starting point for assessing discriminatory intent is "the impact of the official action whether it 'bears more heavily on one race than another.'"

---

[26] *See also Shaw v. Reno*, 509 U.S. 630, 641 (1993) (electoral schemes "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (legislative apportionment scheme is unconstitutional if its purpose was "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities").

[27] As noted, disproportionate effects alone are insufficient to establish a claim of unconstitutional vote dilution.

Id. at 489. Other relevant considerations include: the historical background of the jurisdiction's decision, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, and the legislative history, especially any contemporary statements by members of the decisionmaking body. *Id.*; *Arlington Heights*, 429 U.S. at 268.

2. "*Shaw*-type" Racial Gerrymandering Claim

Although a "legislature always is *aware* of race when it draws district lines," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis in original), it may not use race as the predominant factor in drawing district lines unless it has a compelling reason. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). A *Shaw*-type racial gerrymandering claim[28] is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (emphasis omitted). In such a claim, the plaintiff's evidentiary burden is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motiving the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 1267.[29] The Court's decision in *Bethune-Hill v. Virginia*

---

[28] The Court refers to these claims as *Shaw*-type claims because the Supreme Court first recognized the viability of such a claim under the Equal Protection Clause in *Shaw v. Reno*, 509 U.S. 630 (1993).

[29] Laws that classify citizens on the basis of race are constitutionally suspect, regardless of whether the reason for the

State Bd. of Elections, 137 S. Ct. at 799, additionally made clear that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering" and that courts should evaluate the predominant motive for the design of the district as a whole.

If race predominates, strict scrutiny applies. To survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). For a racial classification to serve a compelling interest, the Legislature must have a strong basis in evidence to support that interest before it implements the classification. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996). Further, the means chosen to accomplish the State's asserted purpose must be specifically and narrowly

---

classification is benign or the purpose remedial. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996); *see also id.* at 907 ("Racial classifications are antithetical to the Fourteenth Amendment . . . ."). The essence of a *Shaw*-type equal protection claim is that the State has used race as a basis for separating voters into districts. *Miller*, 515 U.S. at 911. Such use of race "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 650 (1993). Further, such use of race reinforces the belief "that individuals should be judged by the color of their skin" and "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions" and "threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657.

tailored to accomplish that purpose. *Id.* at 908. To be narrowly tailored, the legislative action must substantially address, if not achieve, the avowed purpose. *Id.* at 915.

This Court previously concluded that compliance with § 2 of the VRA constitutes a compelling governmental interest. Docket no. 1390 at 42 (citing *Bush*, 517 U.S. at 994 (O'Connor, J., concurring); *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1405-06 (5th Cir. 1996)). When a State invokes the VRA to justify race-based districting, it "must have a strong basis in evidence for concluding that the three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2." *Clark*, 88 F.3d at 1405-06; *see also Shaw*, 517 U.S. at 915; *Bush*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability [i.e., the *Gingles* preconditions] are present."); *Harris*, 137 S. Ct. at 1471.[30] "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Harris*, 137 S. Ct. at 1470 (citation omitted).

The legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored. *Shaw v. Hunt*, 517 U.S. at 915. "If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political

---

[30] "[The] 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Harris*, 137 S. Ct. at 1464.

process and to elect representatives of their choice.'" *Id.* at 917 (quoting 42 U.S.C. § 1973(b)). The State may "use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." *LULAC v. Perry*, 548 U.S. 399, 429 (2006).

Compliance with § 5 of the VRA was also a compelling state interest at the time these plans were enacted. However, "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993); *see also Alabama LBC*, 135 S. Ct. at 1274 (noting that the proper question for § 5 nonretrogression is, "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?").

II. Claims based on legislative intent

This case is unusually complex given the Legislature's enactment in 2013 of the Court's interim plans. As noted, the 2013 enactment raised questions of mootness in the 2011 plan phase, and now raises difficult questions concerning the proper resolution of Plaintiffs' *Shaw*-type and intentional vote dilution claims in the 2013 plan case.

Although Plaintiffs' claims focus on specific areas where they have suffered harm, as they must given that racial discrimination and vote dilution claims belong to individuals and not the minority group as a whole,[31] the

---

[31] *See LULAC v. Perry*, 548 U.S. 399, 437 (2006) ("A local appraisal is necessary because the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual

redistricting plans are statewide plans, and Plaintiffs contend that the statewide plans were adopted with discriminatory intent. In addition, with regard to specific areas in which this Court found *Shaw*-type violations and intentional discrimination, Plaintiffs contend that such violations remain in the 2013 plans. Defendants contend that the 2013 Legislature could have no discriminatory intent because it simply relied on this Court's judgment that the plans contained no legal infirmities, despite the interim nature of the plans and the Court's warnings that its decisions were necessarily hasty and not based upon a full review of the facts or the law. Defendants assert that the 2013 Legislature's lack of intent to discriminate in 2013 and the fact that it did not actually draw any districts subject to *Shaw*-type challenges in the interim plans in 2013 mean that all such claims must fail for lack of the necessary intent.[32]

Defendants' position incorrectly assumes that the intent inquiry must be limited to the drawing of district lines in 2013. The Fifth Circuit has rejected such a

---

members.'"); *Alabama LBC v. Alabama*, 135 S. Ct. 1257, 1265-66 (2015) (noting that the harms that underlie a racial gerrymandering claim are personal, including being personally subjected to a racial classification and being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group, though noting that voters could make the claim that every individual district in a state suffers from racial gerrymandering).

[32] Defendants refer specifically to district lines that remain unchanged from the interim plans; the Task Force Plaintiffs have raised a new *Shaw* claim against changes made to HD90 in Plan H358 during the 2013 special session. This discussion does not involve that claim.

position: "[C]ases of this circuit emphasize that the search for improper motivation does not end at the enacting stage." *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978). Rather, the Fifth Circuit has proposed three means by which a plaintiff could meet the purpose standard: A plaintiff could demonstrate either through direct or circumstantial evidence that the government body *adopted* the electoral scheme with a discriminatory purpose, that the government body *maintained* the scheme with discriminatory purpose,[33] or that the system *furthered* pre-existing intentional discrimination.[34] *Jones*

---

[33] *McMillan v. Escambia Cty., Fla.*, 688 F.2d 960 (1982) (affirming district court's holding that at-large voting scheme was being maintained for a discriminatory purpose), *vacated on other grounds* 466 U.S. 48 (1984) (vacating judgment on constitutional grounds and remanding for consideration of whether § 2 claims would support the judgment); *see also Mobile v. Bolden*, 446 U.S. 55 (1980) (considering whether maintenance of Mobile's at-large system for election of City Commissioners violated the Fourteenth Amendment as purposefully racially discriminatory).

[34] *See Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 142 (5th Cir. 1977) ("A redistricting plan is constitutionally impermissible as racially discriminatory if it is a racially motivated gerrymander or if it perpetuates an existent denial of access by the racial minority to the political process."). In *Kirksey*, the court stated:

> Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue

v. City of Lubbock, 727 F.2d 364, 377 (5th Cir. 1984) (discussing *Nevett*, 571 F.2d at 217-21).[35] Thus, under these precedents, although the 2013 Legislature did not draw the challenged districts in Plan C235 and Plan H358

---

unabated. Such a rule would sub silentio overrule *White v. Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

Id. at 146-47. The Court acknowledged that the Supreme Court had required discriminatory purpose in *Washington v. Davis* and in *Arlington Heights*, but reasoned that "nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action." *Id.* at 148.

[35] In *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978), the Fifth Circuit recognized that a plan, racially neutral at its adoption, may further preexisting intentional discrimination, or it may be maintained for invidious purposes. Whether invidious discrimination motivates the adoption or maintenance of a districting scheme or whether the plan furthers preexisting purposeful discrimination, the intent requirement may be satisfied by direct or circumstantial evidence. *Nevett* was decided before the Supreme Court's decision in *Mobile v. Bolden*, but as the Supreme Court noted in *Rogers v. Lodge*, the Fifth Circuit held in *Nevett* that a showing of racially motivated discrimination is a necessary element in an equal protection vote dilution claim. *Rogers*, 458 U.S. at 621 (quoting *Nevett*, 571 F.2d at 219). In *Jones v. City of Lubbock*, 727 F.2d 364, 377 (1984), the Fifth Circuit stated that *Mobile v. Bolden* "cast doubt on the viability of this court's analysis in *Nevett II*." What it cast doubt on, however, is what proof suffices to establish discriminatory purpose, as the Fifth Circuit had relied on the "objective factors endorsed in *Zimmer*" and post-*Bolden* cases "differed in their evaluation of the extent to which the *Zimmer* analysis survived *Bolden*." *Id.* at 378; *see also Corder v. Kirksey*, 639 F.2d 1191, 1194 (5th Cir. 1981) ("Our failure, however, appears to have turned on the quantum of evidence required for such a finding [of discriminatory intent], rather than upon the substance of the approach itself.").

(other than HD90), Plaintiffs could nevertheless establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination.

In addition, the Supreme Court case of *Hunter v. Underwood*, 471 U.S. 222 (1985), refutes Defendants' position. In *Hunter*, the Supreme Court held that a felon disenfranchisement provision adopted with discriminatory intent in 1901 violated the Equal Protection Clause in 1985, regardless of the fact that certain of the more blatantly discriminatory selections had been struck down by the courts, because "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. With regard to those areas in Plan C185 and Plan H283 where the Court found that district lines were drawn with impermissible motive and those lines remain unchanged in Plan C235 and Plan H358 such that discrimination continues to have its intended effect, *Hunter* indicates that those portions of the plans remain unlawful. In those areas, the district lines were motivated by a desire to discriminate on account of race, and they continue to have that effect; thus, they violate § 2 and the Constitution.

Defendants contend that the Legislature's adoption of the Court's interim plans nevertheless removed any such illegality from the plans; they assert that their enactment of the plans in 2013 with no improper motive removes any discriminatory intent. *Hunter* involved the passage of time and a narrowing of the discriminatory legislation by

the courts; it did not involve a later reenactment of the narrowed disenfranchisement law, which is what Defendants now claim cleanses the plans. Other courts have considered the effect of subsequent legislative enactments on the legislative intent inquiry. The most relevant case, because it comes from the Fifth Circuit and involves redistricting, is *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

In *Chen*, the plaintiffs mounted a *Shaw*-type racial gerrymandering claim against the City of Houston's districting, and contended that "the 1997 plan substantially maintained the borders of previous plans, and that those borders were set by a process in which race—specifically, the desire to create two black and two Hispanic single member districts—predominated." *Id.* at 513. The plaintiffs argued "that the City violated *Shaw* by failing to make substantial changes in a districting structure that was originally designed in a manner that race predominated over traditional districting concerns." *Id.* at 518.

The Fifth Circuit rejected the City's assertion and the district court's conclusion that the intent behind the creation of the prior plans was not properly before the court. *Id.* It noted that, in the context of the VRA, "evidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed, even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge." *Id.* The Court then considered Plaintiffs' evidence concerning the earlier redistricting process, but found that its quality fell "far short of that introduced in the cases examined by the Supreme Court," and the Court

did not find that race predominated in the drawing of earlier plans (*i.e.*, there was no prior impermissible reliance on race). *Id.* Later in the opinion, the Court stated that,

> while the district court erred in categorically and totally dismissing evidence of intent garnered from prior plans, it was correct to point out that the state of mind involved in the prior plans is not of itself what is precisely and directly the ultimate issue before the Court in this case. We have noted in a different context that while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment with meaningful alterations may render the current law valid.

Id. at 521 (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).[36] It continued, "We do not suggest that the

---

[36] The Court included the following parenthetical to describe *Cotton*: "while [the] disenfranchisement constitutional provision originated in an attempt to discriminate, subsequent reenactment with alterations approved by voters added categories of crimes originally excluded because they were not considered 'Black' crimes and subtracted a less serious offense that had been considered a 'Black' crime." In *Cotton*, the Fifth Circuit noted that *Hunter* "left open the possibility that by amendment, a facially neutral provision . . . might overcome its odious origin." 157 F.3d at 391. Although the disenfranchisement provision at issue was originally enacted in 1890 with discriminatory intent, it was amended in 1950 and 1968 through a deliberative process, which the court held could "supersede" the previous provision and "remove[] the discriminatory taint associated

with the original version" unless the amendments "were adopted out of a desire to discriminate against blacks." *Id.* at 391-92. Because the Court found no such evidence and because the amended statute sought "to penalize all criminals convicted of certain crimes, Hunter [did] not condemn" the law. *Id.* at 392. Thus, the Court based its holding on the lack of new discriminatory intent during re-enactment and the fact that the amended statute no longer targeted "black" crimes.

The Court notes that there is an important distinction between a felon disenfranchisement law and a district that violates *Shaw*. According to *Cotton*, a law disenfranchising convicted felons is unconstitutional only if it has the intent and effect of racial discrimination, making discriminatory purpose the paramount consideration. Discriminatory purpose is not an element of a *Shaw*-type claim. As this Court has discussed, a district drawn in violation of the *Shaw* principles is illegitimate regardless of whether it was drawn with racially discriminatory purpose because its illegality turns on whether race predominated in the decision of which voters to include and exclude in the district, whenever that decision is made, and whether there was a strong basis in evidence for such use of race. The passage of time or the re-enactment of a plan including the identical district does not typically change any facts concerning which voters were placed within or without the district when it was drawn, unlike discriminatory intent, which can change over time. Thus, the original decisions concerning which voters to place in and out of a district should remain the focus for inquiry in a *Shaw* claim, regardless of a later re-enactment of the identical district, unless there is a showing that the legislature specifically considered who should be in the district during the later re-enactment. Similarly, whether the legislature had a strong basis in evidence for the use of race originally should remain the operative inquiry. However, to the extent a subsequent legislature may have a strong basis in evidence for a previous use of racially predominant criteria that did not exist at the time of the initial enactment, that legislative intent would be relevant in determining whether a district that was an unconstitutional gerrymander when drawn remains so.

changes implemented in 1993, 1995, and 1997 to the original framework were as dramatic as those in *Cotton*. However, that case broadly stands for the important point that when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered." *Id.*

Plaintiffs argue that the taint of discriminatory intent is generally removed from amended legislation only where a fact-specific inquiry reveals that the new statute was enacted significantly later than the discriminatory one,[37] legislators underwent a "deliberative process" prior to amendment or reenactment, and the new statute does not continue the same adverse racially disparate impact. *E.g.*, docket no. 1524 at 9-10. While the Court does not agree that the presence or absence of any of these factors is necessarily dispositive, it agrees that these are relevant considerations for analysis. Based on *Chen/Cotton* and *Hunter*, the Court finds the most important consideration is whether the 2011 plans continue to have discriminatory or illegal effect, and whether the reenactment furthers that existing discrimination: "A state law prohibiting exercise of the vote . . . is unconstitutional if 'its original enactment was motivated by a desire to discriminate

---

[37] The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment. This factor weighs in Plaintiffs' favor. In addition, the *Arlington Heights* factor of the history of discrimination continues to support a finding of discrimination, bolstered by this Court's finding of discriminatory intent by the 2011 Legislature in passing the 2011 plans themselves. Further, there is no indication that the Legislature mitigated its hostility to minority districts.

against blacks on account of race and the section *continues to this day to have that effect.*'" *Cotton*, 157 F.3d at 391 (citing *Hunter*, 471 U.S. at 233) (emphasis added).

In *Chen*, the Fifth Circuit found no *Shaw* violation in the original enactment; thus, there was no issue of a continuing harm. Similarly, in *Cotton*, the Fifth Circuit noted that the amendments to the felon disenfranchisement statute meant that it no longer targeted "black" crimes and that it "now seeks only to penalize all criminals convicted of certain crimes" such that there was no longer any unconstitutional harm flowing from the statute. *Cotton*, 157 F.3d at 392.

Here, in contrast, specific portions of the 2011 plans that this Court has found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects "continu[ing] to this day." *Hunter*, 471 U.S. at 233. The fact that this Court made changes to the statewide plans and the Legislature then adopted the Court's plans does not change this fact. Further, the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans. No changes were made to the congressional plan, and changes to the House plan were subject to severe constraints, rendering them largely cosmetic. Although this Court did not rule out the possibility that coalition districts could be required or that the County Line Rule would have to yield to the VRA, the Legislature continued its steadfast refusal to consider either possibility. And despite the findings of discriminatory intent by the D.C. Court, there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans. Instead,

the Legislature pushed the redistricting bills through quickly in a special session.[38] Rep. Martinez Fischer testified that necessary resources were not allocated to support a true deliberative process.[39]

Moreover, the adoption of the interim plans intentionally furthered and continued any discrimination that might be found in the 2011 plans and incorporated into the 2013 plans. The Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy. Defendants had steadfastly maintained that their 2011 plans had no legal infirmities—throughout this litigation in 2011, when sponsoring the compromise plans in 2012 that became the interim plans, and thereafter. Although the D.C. Court found that the 2011 plans violated § 5 of the VRA and cited evidence of discriminatory intent, Defendants did not accept those rulings and instead appealed to the Supreme Court. Yet upon the urging of the Attorney General, who was responsible for the litigation in this court, they decided to adopt the interim maps.

The decision to adopt the interim plans was not a change of heart concerning the validity of any of Plaintiffs' claims[40] in either this litigation or the D.C. Court litigation

---

[38] The special session did not have a two-thirds rule in the Senate or a calendar rule in the House.

[39] The HRC did not have counsel when the session started, and later Darby announced his intent to hire counsel only for himself. The attorneys later asked to withdraw and the committee was then directed to the TLC. JX-13.4 at 4-5.

[40] *E.g.*, JX-5 (Bill Analysis of SB 1524 introduced by Sen. Seliger in the regular session) ("Though the Texas Legislature remains

and was not an attempt to adopt plans that fully complied with the VRA and the Constitution—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities.[41] The letter from then-Attorney General Abbott to Speaker Joe Straus makes the strategy clear: Abbott advised that the "best way to avoid further intervention from federal judges in the Texas redistricting plans" and "insulate the State's redistricting plans from further legal challenge" was to adopt the interim maps. Quesada-57; DX-858. Thus, Defendants sought to avoid any liability for the 2011 plans by arguing that they were moot, and sought to ensure that any legal infirmities that remained in the 2013 plans were immune from any intentional discrimination and *Shaw*-type racial gerrymandering claims.

---

confident that the legislatively-drawn maps adopted in 2011 are fair and legal and comply with all provisions of federal law, there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.")

[41] The evidence indicates that not only did the strategy originate in the Attorney General's office, but also the legislative fact findings accompanying the plans, before the Legislature had engaged in any fact findings on the bills. Tr1558 (Darby). The fact findings in the introduced versions of the bills included that the interim plans complied "with all federal and state constitutional provisions or laws applicable to redistricting plans." Later, when Sen. Zaffirini offered an amendment to remove the legislative findings, Seliger objected, asserting that the amendment "guts the bill." JX-24.4 at § I p. 13. The amendment failed. The Senate later agreed to remove the language from the Senate plan, which everyone agreed was lawful, but refused to eliminate it from the House and congressional plan bills. Tr1558 (Darby).

Defendants knew that most Plaintiffs would maintain claims against the interim plans if adopted, despite the changes, and that such challenges might indicate that further changes to the maps were required. With regard to the interim plans, Abbott's letter does not say that the plans cure legal infirmities in the plan, only that they "have the approval from the federal judges overseeing this litigation." *Id.* Although this Court had "approved" the maps for use as interim maps, given the severe time constraints it was operating under at the time of their adoption, the Court clearly warned that its preliminary conclusions, which were based on the preliminary injunction "likelihood of success" standard, were not based on a full examination of the record or the governing law and were subject to revision.[42]

The Legislature's own attorney, Jeff Archer, advised them accordingly. JX-14.4 at 6-19; *id.* at 11 (noting that this Court was "in a little bit [of a] tricky [position] because the Court had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses . . . ."); *id.* at 11-12 (the Court's

---

[42] The Court noted, "It is especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 are." Docket no. 691 at 1-2. In addition, this Court was required to defer substantially to the legislative choices and district lines in Plan C185 and Plan H283, and emphasized that its determinations were preliminary and made on an expedited basis. Although the Court endeavored under the time constraints to ensure that the plan contained no legal defects, it did not guarantee that to be the case, and in fact warned repeatedly that its determinations could change after a full trial on the merits.

caveats were "as if to say this is the best we can do now. We haven't gotten to the bottom of things."); *id.* at 12 (noting that the Court was not making final determinations, that the Court noted unsettled and difficult legal issues and factual disputes, and "essentially made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues").[43] Given the remaining legal challenges and this Court's warnings that the interim maps were enacted without a full review of the facts or the law, a reasonable construction of this Court's orders leaves the definite possibility that, upon full review, additional changes would be required to the interim plans in response to legal infirmities.

Moreover, given the D.C. Court's findings of intentional discrimination, Defendants saw a very real possibility that this Court would likewise find that the 2011 plans were the product of discriminatory intent.[44] Rather than trying to cleanse the plans of continuing discriminatory intent or legal defect, Defendants' strategy involved adopting the interim maps, however flawed, arguing that the 2011 plans would never go into

---

[43] At a later committee hearing, Archer correctly explained this Court's position: this Court faced "a tension there between what they thought the Voting Rights Act required and what they thought the deference they had to give until they were sure what the Voting Rights Act required." JX-15.3 at 52. He also noted that "they could go into a lot more issues than they already have." *Id.* at 49.

[44] And they were aware that, even if the Supreme Court ruled in *Shelby County* that § 4's preclearance coverage formula was unconstitutional, such a finding of intentional discrimination could result in Texas being placed under § 5 through bail in.

effect and thus could have no harmful effects, and arguing that the 2013 plans could have no impermissible intent such that, whatever possible or likely discriminatory or unconstitutional effects remained in those plans, Plaintiffs would have no remedy, and Defendants would maintain the benefit of such discrimination or unconstitutional effects. By arguing that there may have been intent but no effect in 2011 and there may have been effect but no intent in 2013, despite the fact that there is unquestionably both intent and ongoing effect, Defendants' actions in 2013 were attempting to prevent Plaintiffs from obtaining relief for purposeful racial discrimination.

In Defendants' view, Plaintiffs could obtain no relief for the Legislature's past discrimination in 2011, and any discriminatory intent and effects remaining in the 2013 plans, however harmful, would be safe from challenge.[45]

---

[45] The Legislature did not believe that passing the interim maps would end the litigation. They knew that Plaintiffs would pursue claims against the interim maps, and they were informed by TLC attorney Jeff Archer that they had not realistically removed legal challenges to the plans apart from those areas remedied by the interim plans. JX-14.4 at 18; *id.* at 19 (explaining that "challenges to both the Court drawn fixes as well as to the background districts that were not changed in any of the plans will go forward" and "the parties to the case will continue to press issues"); JX-15.3 at 56 ("I think it's fair to say by enacting the Court-ordered plan, you've put to bed . . . those issues that the Court identified so far. But I don't know that you put the rest to bed."). Despite knowing that Plaintiffs would continue to pursue relief, they sought to deprive Plaintiffs of a potential remedy. Further, because they felt their strategy would preclude any remedy and they wanted to maintain any partisan advantage obtained regardless of whether it was the result of intentional racial discrimination, they were not truly interested in fixing any remaining

This strategy is discriminatory at its heart and should not insulate either plan from review. *Cf. Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 146-47 (5th Cir. 1977) ("Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial.").

In sum, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

---

discrimination in the plan. Thus, although Darby kept stating that he wanted to be informed of legal deficiencies so he could fix them, he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought "from the start" that the interim plans were fully legal. JX-17.3 at S5. Defendants' strategy would leave Plaintiffs with § 2 effects claims only, and Defendants intended to continue vigorously opposing any plan with coalition districts, despite Fifth Circuit case law holding that such districts could be required. Tr1576-78 (Darby).

III. Dallas-Fort Worth area ("DFW") Claims

Plaintiffs brought § 2 results claims and intentional vote dilution claims, as well as Fourteenth Amendment racial discrimination claims against the DFW districts in Plan C185. Interim Plan C235 made significant changes to the DFW area to address the "not insubstantial" § 5 discriminatory purpose claims of packing and cracking. Plaintiffs alleged that CD30, the only minority district, was packed, while "fingers" from surrounding Anglo-majority districts reached into urban and suburban Dallas and Tarrant County areas to crack minority communities and subsume them in Anglo-dominated districts. As a result, despite its substantial minority population, the DFW metroplex had only one minority opportunity district (CD30) that performed for African Americans, and none for Latino voters.

To address the § 5 discrimination claims, Plan C235 included new CD33, spanning Dallas and Tarrant Counties. Plan C235 withdrew many of the encroachments into minority communities from the Anglo districts surrounding DFW, and the population left behind in DFW from the removed encroachments was placed in new CD33, while accommodating congressional incumbents and taking into account population growth. Docket no. 691 at 36-37. In addition, the minority population of CD30 was decreased somewhat to address the packing allegations, with the Court noting that the H+BVAP of CD30 was 76.7% in the benchmark, 81.5% in

Plan C185, and 75.9% in Plan C235. *Id.* at 37 & n.83.[46] Given the unsettled law and the inability to look at all the necessary factual evidence, the Court was unable to conclude at the time that Plaintiffs were likely to succeed on their § 2 claims premised upon coalition districts. It also found that the Task Force Plaintiffs were not likely to succeed on their claim that a Latino opportunity district was required because their proposed HCVAP-majority district (CD6 in Plan C190) was not compact.

In the Opinion on Plan C185, this Court found that Plaintiffs failed to prove their § 2 results claims in DFW because they failed to satisfy the first *Gingles* precondition for the Latino and coalition districts insofar as none of the proposed districts were compact. Docket no. 1390 at 58-92.[47] The Court did find that mapdrawers violated the Equal Protection Clause by improperly using race in drawing CD26 in violation of the *Shaw* line of cases. And, it found that mapdrawers acted with racially discriminatory intent and intentionally diluted minority voting strength in DFW by intentionally packing and cracking minorities. Docket no. 1390 at 146. Specifically, the Court found that minorities were moved into CD30 to waste their votes, while Anglo voters were moved out of CD30 and into neighboring districts to shore them up as Republican districts, and that mapdrawers drew and then

---

[46] CD30 was also altered to address the intentional discrimination claims brought by African-American Congressperson Eddie Bernice Johnson, who represented CD30.

[47] However, Plaintiffs were not precluded from bringing § 2 results claims against Plan C235 based on the *Gingles* preconditions and the totality of circumstances in 2013.

divided a proposed minority district in the DFW area to minimize current and future minority voting power.

The Plaintiffs' packing and cracking intentional discrimination/dilution claim in this case is essentially the same "not insubstantial" § 5 discriminatory purpose claim that the Court attempted to remedy in Plan C235, but certain Plaintiffs complain that the discrimination is not fully remedied. They contend that packing and cracking remain, intended to prevent the emergence of an additional minority district or districts. Plaintiffs assert that two or three minority opportunity districts are required in addition to CD30 and that the DFW configuration intentionally limits minority opportunity to two districts when more opportunity districts can easily be drawn. The Quesada Plaintiffs further contend that the Legislature intentionally discriminated by knowingly reaffirming discriminatory features identified by the D.C. Court, including specifically the cracking of minority populations in Arlington and Grand Prairie.

As explained in the Court's order adopting Plan C235, CD33 was not intentionally drawn as a minority coalition district under § 2. Rather, it was created to remedy the alleged intentional discrimination (cracking) claims by removing the fingers from the Anglo-majority districts that reached into Dallas and Fort Worth. However, it is majority-minority CVAP when Black and Hispanic CVAP are combined, and it has elected an African-American, Marc Veasey. It has thus performed as a minority coalition district under most Plaintiffs' view that such districts require minority cohesion only in the general

elections.[48] On this basis, the Court concluded in its Order on Plan C185 that Plaintiffs' claims that one minority coalition district was required in DFW (in addition to African-American district CD30) were moot.

However, Plaintiffs continue to assert that more minority opportunity districts are required in DFW, especially one that can elect a Latino candidate of choice in the primary and general elections, to reflect the Latino growth in the area. Certain Plaintiffs contend that CD33 does not provide Latino opportunity because of its failure to elect the Latino-preferred candidate in the primary despite its HCVAP.[49]

---

[48] The Task Force does not share this view, but the Task Force also has not sought the creation of any coalition districts in DFW. Rather, the Task Force sought only the creation of an HCVAP-majority Latino opportunity district. However, the Task Force's proposed district (CD6 in Plan C190) was not compact, and because of the dispersion of Latinos among African Americans, a compact HCVAP-majority district cannot be drawn in DFW using 2011-2015 ACS data.

Other Plaintiffs did seek the creation of a coalition district in DFW, however. And although several of these Plaintiffs (except the Rodriguez Plaintiffs) now contend that CD33 is not a coalition opportunity district but an African-American opportunity district because African-American voters are controlling the Democratic primaries, these Plaintiffs also contend that coalition opportunity for purposes of a *Gingles* results claim should be determined by the general elections, not primaries. Thus, their prior claim that one coalition district was required in DFW under the § 2 results test was mooted by the drawing of a district that performs as a coalition district in the general election.

[49] The Rodriguez Plaintiffs do not challenge CD33 itself, but contend that its configuration "demonstrates the tortured lines the State had to draw in order to avoid creating an additional opportunity district for minorities in Texas." Docket no. 1524 at 24 n.21. They

Defendants contend that (1) there is no evidence of dilutive intent in 2013, (2) no single-minority-majority-CVAP district can be drawn and coalition districts are not required by § 2, and (3) even if coalition districts were required, the record refutes the existence of cohesive voting between Hispanic and African-American voters in the DFW area, as shown primarily by the results of Democratic primaries. Docket no. 1526 at 81-82. The Court has already rejected Defendants' position that coalition districts can never be required by § 2, and does not repeat its analysis here. And the doctrine of constitutional avoidance counsels that this Court should address the statutory § 2 effects claim before analyzing Plaintiffs' constitutional claim. The Court thus considers whether Plaintiffs have satisfied the *Gingles* criteria.

Plaintiffs[50] agree that, despite the strong minority population growth in DFW, it is not possible to draw an additional compact single minority-majority CVAP district. This is due primarily to the fact that minority populations are interspersed with each other, although

---

assert that it does not fix the cracking and packing this Court found in DFW under Plan C185 or "mask the hallmarks of intentional discrimination that persist in DFW under Plan C235," but "only highlights and perpetuates the State's consistent approach of cracking minority populations in DFW to avoid what would otherwise be inevitable: increased electoral opportunities for minority voters." *Id.*

[50] In this section, "Plaintiffs" generally refers to Plaintiffs other than the Task Force. Presumably the Task Force Plaintiffs, who previously argued that their proposed HCVAP-majority district was compact, do not agree that no compact HCVAP-majority can be drawn in DFW. In addition, the Task Force Plaintiffs have asserted no claims against DFW in Plan C235.

these mixed minority populations are geographically concentrated. As a result, each of the proposed demonstration maps creates new minority coalition districts. The Court did not reach the issue of minority cohesion in proposed coalition districts in its prior orders because Plaintiffs did not clear the first *Gingles* hurdle. But the issue is now squarely presented. The Court acknowledges that the evidence presented in this case cuts both ways and the decision is close, but the Court concludes that Plaintiffs have not proved the necessary cohesion.

A. § 2 Results Claims

Gingles 1

Plaintiffs' demonstration plans C284 (NAACP), C273 (Quesada), and C286 (Rodriguez) generally take the same approach and create one additional minority coalition district (in addition to maintaining CD30 and CD33 as minority opportunity districts). Existing CD33, which spans Dallas and Tarrant Counties, is pushed entirely into Tarrant County and made much more compact. It remains a B+HCVAP-majority district, but its HCVAP is decreased and its BCVAP increased.[51] CD30, the existing BCVAP-majority opportunity district, generally maintains a similar location wholly within Dallas County, and its BCVAP remains above or near 50%.[52] The maps

---

[51] In Plan C235, it is 43.6% HCVAP and 23.7% Black Alone CVAP. In Plan C273, it is 23.4% HCVAP and 30.8% Black Alone CVAP. In Plan C284, it is 22.8% HCVAP and 29.4% Black Alone CVAP. In Plan C286, it is 24.6% HCVAP and 30% Black Alone CVAP.

[52] In Plan C235, CD30 is 53.2% BCVAP. In Plan C273, it is 49.8% Black Alone CVAP but 50.4% combined BCVAP. In Plan C284, it is

create the new coalition district in between CD30 and CD33, and each district has a combined H+BCVAP above 50%.[53] Thus, each district satisfies the numerosity threshold, and all three demonstration maps contain one more minority-majority district in DFW than does Plan C235.[54] In addition, based on a review of all the evidence, the Court finds that these districts reflect compact minority communities, including the various mixed-minority cities and neighborhoods within the DFW metroplex and respecting traditional redistricting principles and non-racial communities of interest.[55] *See*

50% Black Alone CVAP and 50.6% combined BCVAP. In Plan C286, it is 54% BCVAP.

[53] In Plan C273, proposed CD3 is 38.4% HCVAP and 19.6% Black Alone CVAP. In Plan C284, proposed CD24 is 39.8% HCVAP and 19.1% Black Alone CVAP. In Plan C286, proposed CD24 is 36.1% HCVAP and 18.7% Black Alone CVAP.

[54] MALC Plan C285 creates an additional coalition district to the east of CD30.

[55] Given its conclusion on cohesion, the Court finds it unnecessary to detail all of the evidence here. But it notes that Dr. Ansolabahere did not set out to draw minority districts in Plan C286, but sought to adhere to municipal boundaries and compactness principles and to avoid dividing minority populations; as a result, his CD24 encompasses the adjacent, majority-minority cities of Irving and Grand Prairie and adds western Dallas and the City of Farmers Branch. CD30 retains its relatively compact shape and includes southern and eastern Dallas and all of the smaller municipalities to the south inside Dallas County. CD33 respects county lines by remaining wholly within Tarrant County and includes population from Fort Worth and Arlington. Its northwestern protrusion somewhat tracks that in Plan C235 but widens the neck and avoids splitting Sansom Park. The northeastern portion is widened and eliminates the protrusion into Forth Worth, and includes all of eastern Arlington rather than the precisely cut out areas in Plan

LULAC v. Perry, 548 U.S. 399, 433 (2006) (recognition of nonracial communities of interest reflects the principle that a state may not assume that members of the same race will share the same political interests and prefer the same candidates).

2. *Gingles* 2

Minority political cohesion is the second *Gingles* precondition, and is the focus of the parties' disagreement in this phase of the litigation. The purpose of this inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. *Gingles* states that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establish[ing] minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56 (citation omitted). The Supreme Court in *Gingles* did not say that primary cohesion was required, but did note that political cohesiveness of black voters was clearly established where "black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general

---

C235. Further, it follows the general contours of CD33 in Plan C235 along the eastern edge of Fort Worth, but follows the Fort Worth municipal boundary on the eastern side instead of leaving small areas out of the district as in Plan C235. The Court further relies on Dr. Fairfax's analysis of NAACP Plan C284 and testimony from lay witnesses Franklin Moss and Rep. Toni Rose.

elections, black support for black Democratic candidates ranged between 87% and 96%." *Id.* at 59.

The Supreme Court has not offered specific guidance on proving cohesion in a coalition context, other than to say that "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential" and there is a "higher-than-usual need for the second of the *Gingles* showings." *Growe v. Emison*, 507 U.S. 25, 41 (1993). This indicates that proof of cohesion is essential for coalition claims, but does not indicate that the standard for proving such cohesion is necessarily any different for coalitions than for single minorities.

In *Campos v. City of Baytown*, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988), the Fifth Circuit held that, "[t]o prove the fact of their electoral dilution, plaintiffs must prove that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." It noted that "the central focus" for the cohesion inquiry is upon voting patterns, and a minority group is politically cohesive if it votes together. *Id.* The court continued,

> the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. . . . The key is the minority group as a whole. Of course, if one part of the group cannot be expected to vote with the other part, the combination is not cohesive. If the evidence were to show that the Blacks vote against a Hispanic candidate, or *vice*

> *versa*, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.

Id. at 1245 (footnote omitted). *Campos* does not specify in which election this voting pattern is relevant or necessary, and it does not mention primaries.

In *Overton v. City of Austin*, 871 F.2d 529, 544 (5th Cir. 1989), the Fifth Circuit looked at whether black and Mexican-American voters "usually combine[d] to support candidates who were usually disfavored by Anglo voters," but there was no discussion of primary elections.

In *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the court considered cohesion among Hispanics, African Americans, and Asians in school board member elections and stated, "The determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the KISD area." *Id.* at 453 (citing *Campos*, 840 F.2d at 1244-45). There was no statistical evidence from the plaintiffs, and lay witness testimony differed on political cohesion among these groups. One expert's multivariate regression analysis showed African Americans and Hispanics were in direct opposition in most KISD elections in which minority candidates ran, and this evidence was unrebutted. The Court found that cohesion was lacking. This case sheds no specific light on the primary issue, however.

In *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), the district court rejected plaintiffs' coalition claim in DFW because "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation."[56] On appeal, the Supreme Court did not consider whether such lack of primary cohesion was important, instead "[a]ccepting . . . that African-Americans do not vote cohesively with Hispanics." *LULAC v. Perry*, 548 U.S. 399, 443 (2006). It accepted this fact to decide the question presented on appeal, which was not whether African Americans and Hispanics were politically cohesive, but whether African Americans had effective control of CD24, even though African Americans made up only 25.7% of the district's CVAP. The plaintiffs argued that they could control the district because they were 64% of voters in the Democratic primary, and that their control of the primary translated into effective control of the entire election.

The district court rejected the argument that African Americans could control the primary because the district was drawn for an Anglo Democrat (Frost), who had no opposition in any primary since his incumbency began, and CD24's demographics were similar to another district

---

[56] The district court also stated that, even assuming Blacks and Hispanics vote cohesively, they must disprove partisanship as the driving force behind the bloc voting, citing *LULAC v. Clements*, 999 F.2d 831, 850 (1993) (en banc). *Session*, 298 F. Supp. 2d at 478 n.88. The parties in this case vigorously dispute the application of *LULAC v. Clements* and whether the role of partisanship must be disproved as a cause of racial voting behavior. Because the Court does not find cohesion, it does not address this dispute.

where an African-American candidate failed when he ran against an Anglo. Instead, the district court found that the district was controlled by Anglo Democrats. On appeal, the Supreme Court found no clear error in this finding, stating that the lack of any contested Democratic primary over the last 20 years left "no obvious benchmark . . . for deciding whether African-Americans could elect their candidate of choice." *LULAC*, 548 at 444. It continued,

> The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially given Texas's open primary system. The District Court heard trial testimony that would support both explanations, and we cannot say that it erred in crediting the testimony that endorsed the latter interpretation.

LULAC, 548 U.S. at 444. The Court continued,

> The opportunity "to elect representatives of their choice," requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an

> African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

Id. at 445-46 (internal citations omitted).

Defendants contend that this language is dispositive of the issue of the role of primaries in cohesion, and that without evidence of cohesion in contested primaries, no coalition claim can be proved. But the Supreme Court did not consider the issue of minority cohesion at all. The Court looked only to the factual question of whether African-Americans actually had the ability to control outcomes in the district, and that fact could not be determined without showing ability to control the primaries. African-American voters were turning out in greater numbers than others in the primary. While this was de facto control, it did not translate into actual control of the primary, because the primary was uncontested—Anglo voters who controlled the district and originally sponsored Frost simply did not feel the need to turn out in the primary because their preferred candidate would emerge regardless. If an African-American (or presumably, African-American-sponsored but not necessarily African-American) candidate did run in the primary, there was no guarantee that candidate would win because African-American voters could be easily outnumbered.

Thus, even though African Americans were voting for Frost in both the primary and the general elections, this did not automatically make Frost their candidate of choice. The evidence credited by the courts showed it was

likely that they were merely voting for the candidate they were permitted to vote for by the Anglos who controlled the district. Thus, because they could not show that they actually controlled the district, as opposed to simply voting along with Anglos who in fact controlled the district, their claim failed.

This discussion in *LULAC* highlights the intensely local and factual appraisal required by § 2 claims, and it indicates that primaries can aid courts in determining voters' candidates of choice—not only by considering who voters are voting for in the primaries (which is relevant to which candidates they prefer), but considering all the relevant circumstances. *LULAC* supports the conclusion that primaries should not be excluded from the minority cohesion analysis, but it does not answer the question of the weight to be given particular primary voting patterns in determining cohesion in this case.

Thus, the current case law from the Fifth Circuit and Supreme Court confirms that primaries are relevant, but provides little guidance on their probative value. Cases outside the Fifth Circuit take conflicting views. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004), the court held that when the two minority groups are generally affiliated with the same party and vote for that party's candidates at high rates, primaries are by far the most probative evidence of cohesion. The court relied on lack of primary cohesion and "the fact that the plaintiffs have presented cohesion evidence for a very limited portion of their proposed district" to find that plaintiffs failed to prove Black-Hispanic political cohesion. *Id.* at 422.

In contrast, the D.C. Court in the § 5 preclearance litigation rejected Texas's reliance on primaries in considering HD149 in the Houston area. It noted that there was persuasive evidence of both concerted efforts among a coalition to elect its preferred candidates and a pattern of success extending across multiple election cycles. *Texas v. United States*, 887 F. Supp. 2d 133, 174 (D.D.C. 2012). Texas argued that the minority groups "do not vote cohesively in primaries and only come together to agree on a second- or third-best candidate in time for the general election" and "this does not prove an effective coalition district." *Id.* The D.C. Court stated,

> We agree that evidence of shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion. In the first place, there is little support for Texas's focus on primary elections. Texas cites *LULAC* for this point, but *LULAC*, a section 2 case, only talks about primaries as a method to determine one minority group's candidate of choice; it says nothing about the need for two groups in a putative coalition to vote cohesively in a primary. More importantly, it does not hold that evidence of cohesion in a primary is necessary to identify a candidate of choice. The same is true here, where there has been no contested endogenous Democratic primary since 2004, when Rep. Vo first won his seat. Texas also cites two district court cases that rely on primary cohesion, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004); and *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D.Tex. 2004), but these cases

represent the minority view. Most courts to address this issue have expressed no preference about the election level at which voting cohesion must be shown. *See, e.g., Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 (4th Cir. 1996); *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 886 (5th Cir. 1993) (en banc); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994).

We agree with the majority view. Courts regularly consider general election data to demonstrate voter cohesion in traditional majority-minority districts, without any indication that such a showing is insufficient without evidence of voter cohesion in the primary as well. Additionally, requiring cohesion in the primary election distorts the role of the primary. Although minority groups sometimes coalesce around a candidate at that point in time, minority voters, like any other voters, use the primary to help develop their preferences. We refuse to penalize minority voters for acting like other groups in a political party who do not coalesce around a candidate until the race is on for the general election. *See Alamance Cnty.*, 99 F.3d at 614-16 ("We reject the proposition that success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater minority support was defeated in the primary.... [S]uch a view is grounded in the belief that minority voters

> essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share." (citation and internal quotation marks omitted)). "Pull, haul, and trade" describes the task of minority and majority voters alike, and candidates may be minority "candidates of choice" even if they do not "represent perfection to every minority voter."

Texas, 887 F. Supp. 2d at 174-75 (some citations omitted).[57]

Plaintiffs argue that they have shown the required cohesion in DFW through expert and lay testimony. Plaintiffs and their experts assert that the relevant focus is on which party primaries minorities choose and their

---

[57] The Court notes that *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996) was not a case about minority cohesion. Rather, the Fourth Circuit was evaluating whether the district court properly determined that the plaintiffs had failed to show that black-preferred candidates were usually defeated. In that regard, the plaintiffs argued that Democrats should be treated as black-preferred only if they were also black-preferred in the primary. The Fourth Circuit rejected that argument, holding that candidates who receive strong black support in general elections are the black-preferred candidate in that election, regardless of their level of support in the primary, and the elections should be counted accordingly in the determination of whether black-preferred candidates were usually defeated. *Id.* at 615. The Court also held that primary elections and general elections must be analyzed separately to determine whether black-preferred candidates were usually successful, to be sure that the regular defeat in one of these phases would not be masked by repeated successes in the other. *Id.* at 615. If anything, this case supports the argument that a court considering cohesion should also look at primaries.

general election cohesion, and that a lack of cohesion in the primaries should be considered irrelevant or, if relevant, should not undermine a finding of cohesion. They note that Defendants' expert, Dr. Alford, admitted that one way for minorities to show that they are politically cohesive is to coalesce around a major political party. Tr1443. Defendants, on the other hand, argue that focusing on the Democratic primaries is essential, and that Plaintiffs cannot establish minority political cohesion without proof of primary cohesion. Their expert, Dr. Alford, has consistently opined that "Blacks and Hispanics do not vote cohesively in either party [primary], and in fact are more likely than not to oppose each other's preferred candidates." Alford 2014 Supp. Report at 15.

Plaintiffs' experts offered various bases for their positions that the key focus should be on general election cohesion. These were generally that: (1) the general elections are the "key" or operative contests for electing candidates of choice; (2) the general elections involve many more voters and primary participation is small; (3) primary voters do not accurately reflect the voting population and are "skewed," and may even involve members of the other party because Texas has open primaries; (4) primary voting may be strategic wherein voters vote for second or third choice candidates because they believe they have a better chance at success in the general election. *See* docket no. 1340 ¶¶ 700-702; Tr1052, Tr1203-05 (Ansolabahere); Tr410-11 (Chervenak); Tr98, Tr114-15 (Brischetto). All of these factors affect the probative value of primary elections, but they do not require us to ignore primary elections altogether. As Dr. Alford explains, primaries reflect actual voting behavior,

still involve a significant number of voters, and are an integral part of the process leading to election of candidates. Tr1364, Tr1461. Because the most pertinent indicator of political behavior is voting behavior, this Court finds that primary elections should be considered as part of the minority group's overall voting behavior, but will give the primaries the weight the evidence shows that they deserve.

This Court previously made certain fact findings relevant to the issue of cohesion. The Court noted that there is a strong correlation between partisanship and ethnicity in current Texas politics, and that African Americans and Latinos have tended to identify with the Democratic party in recent years due to shared issues, lack of Republican vote courting, and the rise of the Tea Party, while more Anglos have shifted to the Republican party. Docket no. 1340 ¶¶ 678, 681. This has been more true for Latinos in recent years because Republicans have not done a very good job of reaching out to Latinos and some party positions on immigration do not attract Latinos. *Id.* ¶ 680. African Americans and Latinos share many common interests and generally feel that the Democratic party is more responsive to those interests.

Evidence from prior phases of this litigation consistently showed that, statewide, African Americans and Latinos choose to participate in Democratic primaries rather than Republican primaries[58] and consistently

---

[58] Docket no. 1340 ¶ 683 ("There is almost no African-American voter participation in the Republican primaries, and very little Hispanic participation."); *id.* ¶ 684 ("Dr. Lichtman found that Latino and African-American voters in Texas are cohesive in that both voter

support the Democratic candidates in general elections, regardless of their race. Docket no. 1340 ¶¶ 688, 696, 697, 706.[59] However, in the Democratic primaries originally studied by Dr. Engstrom (primaries for statewide offices in 2008 and 2010), he found that non-Latinos (which included both African American and Anglo voters) did not consistently share the candidate preferences of Latino voters. African-American voters shared support for only one of five primary candidates preferred by Latinos in Dallas and Tarrant Counties. Docket no. 1340 ¶ 685.

In his corrected Rebuttal report, Engstrom found that Latino voters were very cohesive in their preferences for Latino candidates in Democratic primaries but African-American support for Latino-preferred candidates was not typically present in primaries and, in fact, African-American voters had "a distinct tendency to vote for candidates competing with the candidates preferred by Latinos in primary elections." *Id.* ¶ 686. Dr. Alford also concluded that African-American and Hispanic voters are not generally cohesive in the Democratic primary, and that the polarization is based on the ethnicity of the candidates such that a "Black candidate will not typically be the candidate of choice of Hispanic voters in the Democratic primary" and "the Hispanic candidate will

---

groups overwhelmingly choose to participate in Democratic rather than Republican primaries.").

[59] This trend was so strong that Dr. Alford assessed whether districts were minority opportunity districts by looking at Democrat wins/losses and noted that in Texas, minority candidates of choice means Democrats. Docket no. 1340 ¶ 688. In this phase of the litigation, many of Plaintiffs' experts have taken a similar approach in assessing performance for minority districts.

typically not be the candidate of choice of Black voters in the Democrat primary." *Id.* ¶ 687. Kousser also found that Latinos and African Americans were not cohesive in the Democratic primary, with Latinos voting for Latino candidates but African Americans not tending to support Latino candidates in the 2010 Democratic primaries. *Id.*

Based on all the prior evidence, this Court found that in general, Hispanic voters are politically cohesive in general and primary elections, African-American voters are politically cohesive in general and primary elections, Latinos and African Americans are often *not* cohesive within the Democratic primary, and African-American and Latino voters are politically cohesive in general elections in support of the Democratic candidate, regardless of the candidate's race. Docket no. 1340 ¶¶ 703-706. However, *Gingles* requires a local appraisal for minority cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("Our recent opinion in *Overton v. City of Austin* cautions against reaching conclusions about inter-minority cohesion absent a diligent inquiry into the political dynamics of the particular community.").

It is undisputed that African-American and Latino voters show very high rates of cohesion in general elections in Texas in general and specifically in Dallas and Tarrant Counties. Dr. Ansolabahere testified that, based on his analysis, African-American and Latino voters vote cohesively in the general elections to elect their preferred candidates. Tr1201; Rod-955 (Table 9) (in Dallas County and Tarrant County Black support for Democratic candidates was estimated at 100%, while Latino support ranged from 68.4% to 81.7% in Dallas County and 71.5% to 80.6% in Tarrant County). Dr. Lichtman's ecological

regression analysis found near-perfect cohesion in support of the Democratic candidate between African American and Latino voters in the five 2008 and 2010 general elections he studied: In Tarrant County both estimates were 100% and in Dallas County both estimates were 99%. Joint Expert Ex. E-3 Table 2.

Dr. Engstrom previously found that Latinos in Dallas County supported the Latino candidate at high levels, between 81.1 and 88% and African-American support was over 90% in all general elections. Docket no. 307-1 at 13. In Tarrant County, Dr. Engstrom found that Latinos supported the Latino candidate at high levels, between 84.3 and 98.3%, and African-American support was above 90% in all elections. Docket no. 307-1 at 18-19. Dr. Engstrom's 2017 analysis reveals that this trend generally continued in 2014 and 2016. TF-19. In Dallas County, Latinos supported Latino Democrat candidates at rates of 78.3, 73.4, and 87.2% and African Americans at 95.5, 94.9, and 92.9%. In Tarrant County, Latinos supported Latino Democrat candidates at rates of 81.2, 78.6, and 88.1%, and African Americans at 92.7, 92, and 92.4%. TF-19.

Chervenak's racially polarized voting analysis of recent elections within Dallas County and Tarrant County also found high levels of cohesion, with each group supporting candidates from both racial groups, and other voters not sharing their preferences. NAACP-2 at 6-8; Tr105 (Brischetto) ("The minority candidate of choice in the general elections have been the Democratic candidate in each case.").

It is also undisputed that African Americans and Latinos primarily choose to participate in Democratic

primaries. With regard to choice of primary, Dr. Lichtman previously looked at individual counties. Joint Expert Ex. E-3. In Dallas County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 97.52% and Latinos at a rate of 88.72%. African Americans participated in the 2010 Democratic Primary at a rate of 90.43% and Latinos at a rate of 59.21%. In Tarrant County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 96.33% and Latinos at a rate of 83.54%. In the 2010 Democratic Primary, African Americans participated at a rate of 81.25% and Latinos at a rate of 31.66%. Lichtman noted that the lower Latino participation in 2010 was likely due to relatively small numbers of Latino voters participating at all, and there was much lower Hispanic participation in Democratic primaries in 2010 than 2008, while Hispanic participation in Republican primaries remained relatively constant. Joint Expert Ex. E-3 at 5-6, Table 1. Dr. Engstrom also noted that "[t]he number of Latinos receiving ballots in the 2014 Democratic primary substantially exceeded those in the Republican primary that year." TF-19 at 6 n.2 (in Dallas County, 6,859 Democrat and 3,579 Republican, in Tarrant County 5,816 Democrat and 4,108 Republican).[60]

---

[60] Dr. Lichtman's analysis of participation in the 2008 and 2010 Democratic primaries showed that many more African Americans vote in the primaries than do Latinos: In 2008 in Dallas County, 37,859 Hispanics voted while 86,528 African Americans voted. In 2010, 6,771 Hispanics voted while 23,522 African Americans voted. In 2008 in Tarrant County, 24,472 Hispanics voted while 36,116 African Americans voted. In 2010, 2,239 Hispanics voted, while 6,988 African Americans voted. Joint Expert Ex. E-3 Table 1.

However, Defendants contend that, without proving cohesion in the Democratic primaries, Plaintiffs cannot establish *Gingles* 2 for coalition districts. As noted, though African Americans and Latinos are choosing to vote in the Democratic primaries, they are often not cohesive in Democratic primaries, and that remains true in certain Democratic primaries in Tarrant and Dallas Counties. Dr. Engstrom previously analyzed statewide elections in 2006, 2008, and 2010, and found that African Americans were "the least likely group [between African Americans and 'others'] to support Latino candidates in Democratic primaries" in Dallas County and that African Americans supported the Latino candidate in only one of six primaries in Tarrant County. Docket no. 307-1 at 15, 20-21, Tables 5 & 7. There were no Democratic primaries in 2012 that met his inclusion criteria. Dr. Engstrom performed an updated primary analysis in 2017, but it includes only the 2010 Democratic primary for Governor with two candidates, Latino Reynaldo Madrigal and Anglo Wendy Davis. Madrigal was not the choice of Latino voters or African-American voters in either Dallas or Tarrant County, though he received higher Latino support (30.9% in Dallas County and 26.5% in Tarrant County) than African-American support (1.9% in Dallas County and .2% in Tarrant County). TF-19. Dr. Alford casts this primary as non-competitive and suggesting "at most that in a very non-competitive contest, the winning Anglo candidate was the choice of Anglos, Blacks, and Hispanics." D-878 (Alford 2017 Report) at 10.

The results of Dr. Engstrom's analyses for Democratic primaries in Dallas and Tarrant Counties are set forth in the following tables:

Dallas County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	27.2 24.5 - 29.9	50.5 46.6 - 54.5	43.2 41.4 - 45.0
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	60.2 52.2 - 68.7	43.4 40.6 - 46.3
2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.6 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.4 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4

2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	47.0 45.3 - 48.8	77.6 74.3 - 81.0	31.5 30.0 - 32.9
2010 Dem. Primary Land Comm'r (Uribe)	27.2 25.1 - 29.2	64.6 60.6 - 68.9	51.7 50.0 - 53.4
2014 Dem. Primary Governor (Madrigal)	1.9 0.8 - 3.2	30.9 26.4 - 34.7	2.7 1.5 - 4.0

Tarrant County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	30.8 25.5 - 35.8	46.2 39.0 - 53.5	45.3 43.1 - 47.5
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	30.4 25.5 - 35.1	66.1 56.4 -76.6	47.5 44.9 - 50.1
2008 Dem. Primary US Senate (Noriega)	66.0 63.4 - 68.7	72.4 68.2 - 76.9	51.5 50.5 - 52.5

2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 24.2 - 30.9	79.4 74.2 - 85.1	31.2 30.0 - 32.4
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	42.2 38.9 - 45.5	85.0 80.6 - 89.6	40.5 39.4 - 41.7
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	42.9 38.5 - 47.2	73.3 67.3 - 79.7	39.6 38.3 - 41.0
2010 Dem. Primary Land Comm'r (Uribe)	24.1 19.1 - 28.8	64.3 57.1 - 72.0	35.4 33.8 - 36.9
2014 Dem. Primary Governor (Madrigal)	0.2 0.1 - 0.5	26.5 22.9 - 29.9	1.7 1.0 - 2.5

Dr. Chervenak examined the 2012 Democratic primary for HD 101 in Tarrant County. NAACP-2 at 8, 17. His analysis showed that the black candidate (Barnett) "was not the preferred candidate of either black or Latino voters." *Id.* at 8. At trial, Plaintiffs' counsel elicited testimony from Dr. Alford that neither group preferred the black candidate and "they're voting for the same candidate." Tr1477-78 (Alford); NAACP-2 at 8, 17. However, Dr. Chervenak's analysis does not indicate

whether and to what extent black and Latino voters coalesced in support of a candidate because there were two other candidates in addition to the black candidate.

The NAACP and African-American congresspersons note that, as shown in NAACP-46, there were many Democratic primary races in Dallas County in 2016 where Latino and African-American candidates were uncontested by members from the other race.

Dr. Alford notes that, in the current phase, the evidence relevant to minority cohesion in the Democratic primaries comes primarily from Dr. Engstrom. Reviewing that evidence, he concludes, as did Engstrom in his earlier report, that "they do not show Black-Hispanic cohesion, but instead, if anything, suggest opposition." D-878 at 10. He further notes that, aside from Engstrom's reports, there is "very little from the remaining [experts] that informs the question of cohesion in proposed coalition districts." *Id.* at 11. While Dr. Chervenak did include endogenous primaries, despite his position that only statewide general elections should be considered (due to a lack of sufficient elections), Alford notes that these only examine existing districts, and do not purport to demonstrate cohesion in primary elections in proposed districts.

Defendants further focus heavily on the primaries in HD90 in Tarrant County and CD33. Dr. Engstrom examined the 2012 HD90 Democratic primary using multivariate ecological inference. PL-967 at 7. He found 65.7% Latino support, 37.7% African-American support, and 30.2% non-minority support for the Latino candidate Carlos Vasquez against Anglo incumbent Lon Burnam. *Id.* at 7-8. There were 3,987 votes cast in the primary, and

Vasquez lost by 159 votes: 2,073 to 1,914. *Id.* at 8. In the 2014 Democratic primary in HD90, Dr. Engstrom found Latino support for Romero was 78.2%, while African-American support was 12.6% (and other voters 24.3%). TF-19 at 11, Table 4. There were 5,078 votes cast in the primary, and Romero won with 51.08% (2,594 votes). This race did not show cohesion between Latinos and African Americans. Tr433-34 (Chervenak). HD90 overlaps significantly with Plaintiffs' proposed CD33 in Tarrant County.

Defendants note that Hispanic and African-American voters did not support the same candidate in the 2012, 2014, or 2016 Democratic primaries in CD33. Tr1368-71 (Alford). Current CD33 areas would be included in Plaintiffs' proposed coalition districts. In the 2012 primary, CD33 was an open seat, and African-American Marc Veasey and Hispanic Domingo Garcia both sought the nomination. It appears undisputed that both were viable candidates. CD33 spans Dallas and Tarrant Counties; Veasey was from Fort Worth/Tarrant County, and Garcia was from Dallas. TrA1401 (Murray). Alford estimated that 77.9% of Hispanic voters supported Garcia, while 85% of African-American voters supported Veasey, "exhibiting fairly cohesive support for opposite candidates." Tr1367-68 (Alford); D-424 at 17; DX-883. Dr. Murray felt that both race and the county "home factor" affected voting in the runoff because each candidate won his home county, and Veasey did not receive much black support in Dallas County. TrA1401 ("There wasn't much turnout, and he didn't win it by much; whereas, he did very, very well in his home county of Tarrant. So there's this home factor. But, unquestionably, in this primary

there's a good deal of voting for somebody that looks like you or has the same last name or your ethnic or racial group"). Korbel thought the district would have a high probability of electing a Hispanic but did not anticipate the home-county rivalry. Tr830-31.

However, despite the split in the primary, Murray noted that Black and Hispanic voters coalesced around Veasey in the general election, including those heavily Hispanic precincts that voted for Garcia in the primary. He compared the top four performing heavily Hispanic precincts for Garcia in the primary in Dallas County to see if they supported Veasey in the general election, and found that they did—the average support for Garcia in the primary was 91.3% but these same precincts had an average support for Veasey in the general election of 81%. NAACP-64 (Murray Feb. 28, 2014 Supplemental Report on Plan C235) at 20.

In the 2014 Democratic primary, Veasey (now the incumbent) received over 90% of the Black vote, while Hispanics split their vote almost evenly between Veasey and Sanchez. Tr1369-71 (Alford); DX-883. Thus, although half of Hispanic voters now supported Veasey, half did not.

And in the 2016 Democratic primary, Veasey again received over 90% support from Black voters, but his Hispanic support fell (from 49.6% in 2014 to 32.9% in 2016), and 67% of Hispanic voters supported Carlos Quintanilla. Tr1370-71; DX-883. Alford noted that, even after a considerable period of time in which we have an incumbent who's had a chance to effectively represent everyone in the district, Hispanic voters still would prefer

that there be an Hispanic representative in that district. Tr1370-71.

Dr. Lichtman performed an ecological regression analysis of the percentage of Anglos, African Americans, and Latinos among voters participating in the Democratic primaries for CD33. Tr956-58; Quesada-1 (Lichtman report) at 50 (Table 2). In the 2012 primary, 2.4% of Latino VAP turned out, making them 36% of voters in the primary; 14.8% of African American VAP turned out, making them 64% of voters, and Anglos were 0% of voters. In the 2012 runoff, 3.4% of Latino VAP turned out, making them 47% of voters, and 13% of African American VAP turned out, making them 53% of voters. In the 2014 primary, 2.3% of Latino VAP turned out, making them 35% of voters, and 15% of African American VAP turned out, making them 65% of voters. In the 2016 primary, 4.4% of Latino VAP turned out, making them 39% of voters, and 20.5% of African American VAP turned out, making them 53% of voters (Anglos were 8% of voters). This demonstrates how low primary turnout is overall, and especially for Latinos, whose highest turnout percentage was 4.4% of voting age population. It also confirms that African-American voters dominate the primary based on their relative turnout. Tr957-58.

All experts agree that both Latino and African-American voters strongly supported Veasey in the general election. Lichtman found 99% African-American support and 95% Latino support in 2012 and 100% African-American support and 98% Latino support in 2016. Tr959 ("[G]iven those degrees of cohesion, this is pretty safely a district where African Americans and Hispanics in the general election can elect candidates of

their choice. And as I said, this is when you really get the verdict of voters, not in those low turnout primaries."); Lichtman Report at 52 (Table 4).

Lichtman's analysis showed that 55.7% of African-American VAP turned out in the 2012 general election, making them 41% of the voters, 10.8% of the Latino VAP turned out, making them 27% of the voters, and 41.2% of the Anglo VAP turned out, making them 32% of the voters. Lichtman Report at 53 (Table 5). In 2016, 45.6% of the African-American VAP turned out, making them 31% of the voters, 14% of the Latino VAP turned out, making them 33% of the voters, and 49.6% of the Anglo VAP turned out, making them 35% of the voters. *Id.* Lichtman noted that this demonstrates that turnout in general elections is vastly higher than turnout in primaries, and that combined African Americans and Latinos comprise a majority of the electorate. Tr959. Dr. Alford felt that "partisan voting reunited Black and Hispanics in voting for the Democratic candidate" in the general election; he found that the evidence "does not support the assertion that there is a cohesive, geographically compact coalition that can be treated as a single group." D-424 at 18-19.[61]

Based on an analysis of primary elections in CD33, Alford's opinion is that black and Hispanic voters in the district are not cohesive in their choice of minority candidates in the primary in the district. Tr1371. He notes that this is why some Plaintiffs' experts characterize the current CD33 as a black opportunity district and not a

---

[61] Dr. Alford also concluded that Anglo voters were not cohesive or at least "not polarized in a way that would enable the Anglo vote to block the nomination of a Black- or Hispanic-preferred candidate." D-424 at 18.

coalition district. Tr1371-72.[62] He further notes this is why the *Gingles* proposals do not truly propose minority coalition opportunity districts, but either African-American or Hispanic opportunity districts. Plaintiffs' *Gingles* proposals, in one form or another, shift decidedly in the direction of increasing the black CVAP proportion of CD33, not seeking to make the district work as a combined majority district, but seeking to make the district more securely a black opportunity district. Tr1374.[63] Similarly, the new coalition district placed between CD30 and CD33 is proposed to perform for Latinos, helping to cure the Latino representation gap in DFW. Although Alford agrees that black and Hispanic voters come together in the general election because of partisanship, he feels that whether they can get a representative of choice from their ethnic group is of critical value. Tr1382-83.

Dr. Alford admitted that in CD33, the general election turnout ranged from 28.2% in 2014 to 53.6% in 2016, while the Democratic primary turnout ranged from 1.3% in 2014 to 8.6% in 2016. Tr1454. He further admitted that the number of Hispanics who chose to vote for Veasey in the general election far surpassed the number that even turned out for the primary. Tr1460. For those Hispanic

---

[62] Dr. Lichtman not only stated that CD33 is an African-American opportunity district, he stated that Hispanics are "shut out" in CD33 due to high African-American primary turnout. Tr955, Tr963.

[63] Alford feels that many of the proposed coalition districts will turn out to be African-American districts, thus giving more representation to a group that is not significantly under-represented, while not fixing the underlying problem of Hispanic under-representation. Tr1380-81.

voters who did not vote in the primary, Quesada Plaintiffs contend that Veasey was their first and only choice, such that he was the first choice of 65.6% of Hispanic voters and the second choice of 17.9% of Hispanic voters, and not the choice of 16.4% of Hispanic voters. Docket no. 1527 at 47. Dr. Alford admits that he reaches his conclusion concerning the lack of cohesion solely on the primary elections and not general elections. Tr1448.

In addition to primaries, Defendants cite to lay witness testimony indicating a lack of cohesion, including specifically: (1) the testimony of Tarrant County commissioner Roy Brooks, who stated that in the CD33 primary and other elections, Black and Hispanic voters have supported different candidates, Tr1237[64]; (2) Franklin Moss's testimony that in Democratic primary elections in Tarrant County, Black and Hispanic voters are less likely to vote for the same candidates, Tr1307[65]; (3) Alex Jimenez's testimony that in Tarrant County,

---

[64] Brooks agreed that, in his experience in Tarrant County, sometimes African-American and Hispanic voters prefer different candidates in Democratic primary elections, such as in CD33 in 2012. Tr1237. The majority of African-American voters in Tarrant County supported Veasey and the majority of Hispanic voters in Tarrant County supported Garcia in the runoff. Tr1237. In general elections in Tarrant County, African-American voters and Hispanic voters coalesce to vote for the same candidate; they both tend to be Democrats. Tr1239 (Brooks).

[65] Moss had "been informed" that Latino and African-American voters do not always support the same candidates and agreed that would be more likely to occur in Democratic primaries. Tr1307. He also agreed that, in Tarrant County, all things being equal, African-American voters would prefer to have an African American represent them. Tr1307.

Black voters would rather support Anglo candidates than Hispanic candidates, Tr359[66] ; (4) Rep. Anchia's testimony concerning tension between black and Hispanic school board members on the Dallas School Board, Tr136; (5) Elizabeth Alvarez Bingham's deposition testimony that minority groups do not vote cohesively in Dallas County (docket no. 1460-6 at 77-78[67]). Docket no. 1526 at 83-84.

Plaintiffs, on the other hand, offered testimony from lay witnesses to show cohesion. Franklin Moss is an African-American NAACP member who has been a Fort Worth resident for 72 years. He testified that he endorses Latino candidates, and he cited a recent Fort Worth City council election for District 2 as an example where African-American and Latino residents of Tarrant County worked together to elect a Latino candidate they both support. He testified that "a group of persons inside of the loop, 820," which is an area that is predominantly black and Hispanic, worked together to ensure that they elected a city council representative from District 2, and they have been successful in electing a Latino representative. Tr1297-98.

---

[66] "Q. In your experience in Tarrant County do you believe that African Americans would rather support Anglos than a Hispanic candidate? A. Yes."

[67] "Hispanics in Dallas County do not all vote the same even within political parties. African-Americans as well. Even within political parties, there is a generational gap in the democratic party between older Hispanics and African-Americans and younger Hispanics and African-Americans. And within the democratic party there is a large disconnect and substantial infighting, cross-party accusations and claims of racism between the Hispanics and African-Americans in a democratic party as against each other."

Rep. Toni Rose (HD110) from Dallas County testified that the Latino community came out in protest and support for a recent African-American police shooting victim. Tr1310. She also testified that the issues that face the African-American community and the Latino community are melded together; they both have issues with and are affected by access to health care, issues with poverty, issues with immigration, racial profiling. Tr1311. Rose stated that, in Dallas County, after the passage of SB4 (the sanctuary cities bill), the Latino community and the African-American communities came together to support the Latinos' efforts to have the City of Dallas join in the lawsuit in opposition to the bill. Tr1315-16. Rose testified that there is a political coalition between African Americans and Latinos in Dallas County, and that quite a few Latino judicial candidates who ran in county-wide races would not succeed without the coalition and African-American support.[68] Similarly, she felt that African-American county-wide officials would have the same difficulty without Latino support. Tr1311-12.

Rep. Johnson, an African American, long-time resident of Dallas County, and representative of HD100, testified that "when there are races that are conducted in districts where you have African-Americans and Latinos living together, which is a lot of my district and, frankly,

---

[68] Rose was aware that some had run in contested primaries, including Hector Garcia and Maricela Moore. She was not aware of Garcia's primary opponent, but she testified that Moore's opponent was Monica Purdy. Tr1321-22. She testified that Hispanics and African Americans voted for Moore, and assumed that because Moore won, she received a large amount of African American support, but she did not have specific knowledge of the voting patterns. Tr1322.

most of the southern portion of Dallas before you get to the southern Dallas suburbs," then "voters of color" would coalesce around the same candidates. Tr518-19. He also testified that he receives Latino support in his elections and that they have never talked of running a candidate against him, because he is responsive to their interests. Tr519-20. He testified that Dallas County Sheriff Lupe Valdez "gets a lot of support across communities" and that she would not continually win without support from Latinos and African Americans. Tr520. He further testified that his mother "loves" Rep. Anchia and "we have all kinds of crossover appeal like that in our districts because we've lived together for so long, those two communities." Tr520-21.

Rep. Anchia testified that MALC's proposed CD6 located in Irving and Grand Prairie roughly mirrored the county commissioner district in Dallas County represented by Elba Garcia, that Korbel's analysis indicated it would perform for the Democrat in general elections, and that it was likely that a Latino would win. Tr713-17. However, Rep. Anchia specifically stated at trial that he was not providing testimony on African-American and Latino cohesion. Tr719-20. Nevertheless, in his deposition, he testified that he had seen examples of Latinos and African Americans being cohesive in Dallas, and that he believes they are cohesive more often than not. Anchia depo. at 117, 163. And former Plaintiff Juanita Wallace, a long-time Dallas resident, offered testimony that Black and Latino voters work together to elect candidates, noting specifically Elba Garcia, who got significant support from Black voters, though she had not

specifically reviewed election data for the race. TrJ568-59, TrJ582.

Raul Magdaleno testified that there is a coalition in Dallas between Latinos and African Americans, and that they tend to vote together based on issues important to them that they have in common, such as education, health care, and economic disparities. TrJ1134.

Both lay witness testimony concerning cooperation between the minority groups and statistical evidence can be used to prove cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453-54 (5th Cir. 1989). Statistical evidence is not a legal requirement or the "sine qua non to establishing cohesion," but Plaintiffs "must still satisfy their burden of proof." *Id.* at 454. Lay witnesses testified generally about black and Hispanic coalitions and shared political identity stemming from shared community concerns. Certainly it is undisputed that black and Hispanic voters choose primarily to vote in the Democratic primary, and that they vote cohesively for the Democratic candidate who emerges from the general election, regardless of the candidate's race, and regardless of whether they supported them in the primary.

Lay witness testimony concerning primary cohesion was mixed. And the statistical analyses of Democratic primaries in Dallas and Tarrant Counties consistently demonstrates that black and Latino voters are not cohesive. It seems undisputed that, all things being equal, each group would prefer a candidate that looks like them. *E.g.* Tr1307 (Moss) ("And in Tarrant County, all things being equal, you would agree with me that African American voters would prefer to have an African American represent them, right? A. Yes."). That is why

Dr. Murray and the African-American Congresspersons have testified that, when there are roughly equal numbers of black and Latino population in a district, they will develop "tension" as each group vies to elect candidates of their own in the primaries. While it was explained that this was more likely when the groups were not consulted in drawing the districts or when representation for one or both groups was proportionately low, it indicates that these groups cannot functionally be treated as one in terms of voting behavior. And whether minority groups have the opportunity to elect candidates of their choice is the operative inquiry for *Gingles*. Primaries inform the analysis of whether each minority group in the coalition has the opportunity to elect candidates of their choice, or whether, as Dr. Alford put it, one group is acting as "filler." Most Plaintiffs' experts agree that, in CD33, Latino voters are not able to elect their candidate of choice.[69]

---

[69] It is especially interesting that Latinos are not having success in CD33, given the expectation when it was drawn that it would perform for Latinos in light of its proportionately higher HCVAP. Contrasting the situation to that in CD24 in Dallas County considered in *LULAC v. Perry*, it cannot be said that Hispanic voters are simply allowing African-American voters to vote for their candidate of choice in the primary, because unlike CD24, where there was no contested primary, Hispanics have sponsored a candidate in the CD33 primaries. Although it need not decide the issue, the Court does not necessarily agree that Latinos lack opportunity in CD33. In *LULAC*, the Supreme Court noted that "[t]he opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." 548 U.S. at 445. The African-American voters in CD24 could only ever influence the outcome of the primary given their low HCVAP% and lack of cohesion

Also troubling is the fact that African-American voters do not act cohesively in support of Latino candidates against Anglo candidates. While the probative value of the HD90 primaries is diminished by the fact that only approximately 5,000 voters or fewer are involved and the Anglo candidate was a long-time incumbent favored by the black community, Dr. Engstrom's primary analyses of statewide elections in Tarrant and Dallas Counties demonstrate that African Americans are even less likely to support Latino candidates than are Anglo voters. The consistent lack of cohesion severely undermines Plaintiffs' claims, as does their assertion that their new proposed coalition districts would perform for one group or the other, and not both cohesively.

Considering all of the lay witness and statistical evidence as a whole, the Court finds that Plaintiffs have failed to establish the necessary minority cohesion to satisfy *Gingles* 2. Accordingly, the *Gingles* results claims must fail.

---

with Latinos (as found by the district court). In this case, black and Latino voters together can control the outcome of primaries in CD33, based on their numbers, if they vote together, and could thus demonstrate the opportunity required by *Gingles*. But they have not voted together in the primaries, and black voters have controlled the primaries based on relative turnout. But there are 142,637 citizen voting age Hispanics (327,150 multiplied by .436) and only 78,516 citizen voting age African Americans (327,150 multiplied by .24) in CD33, meaning that Hispanic voters should easily be able to defeat African-American voters if they increase their relative turnout. Regardless, unless they vote cohesively in the primaries, it is not a minority coalition opportunity district.

B. Intentional Discrimination/Vote Dilution Claims

As noted, several Plaintiffs contend that the configuration of DFW and the addition of CD33 in DFW did not remedy the cracking and packing and intentional discrimination found by this Court concerning Plan C185. As discussed above, Plaintiffs complained generally that in Plan C185, minority communities in DFW were cracked (primarily within urban areas where fingers reached in from Anglo-dominated suburban districts). They also complained that CD30 was packed with minorities. This Court addressed those claims in Plan C235 by removing the fingers from minority areas, and what was left was CD33. The Court noted that CD33 was "appropriate to remedy the alleged race-based discrimination that occurred" but "goes no further than required under *Perry v. Perez*." Docket no. 691 at 38. When this Court later analyzed the entire record, it found that Downton had intentionally drawn and cracked a proposed minority district. CD33 looks significantly like the proposed minority coalition district that this Court found was drawn and then intentionally cracked. Thus, CD33 in Plan C235 is an appropriate remedy for that cracking, without going further.

The Court also addressed Plaintiffs' claims that CD30 was packed in Plan C235 by reducing the combined minority population to near benchmark levels.[70] When this

---

[70] This Court noted that the combined H+BVAP was increased from 76.7% in the benchmark to 81.5% in Plan C185, but reduced to 75.9% in Plan C235. Docket no. 691 at 37 n.83. The D.C. Court also noted that CD30 was packed insofar as the combined minority voting age population was increased from the benchmark district by 4.8%.

Court later analyzed the entire record, it found that Downton had moved Anglo voters out of CD30 and minority voters into CD30, increasing the minority population above benchmark levels. Because Plan C235 returned these population levels to slightly below benchmark levels, it appropriately remedied that packing.

Plaintiffs complain that Plan C235 does not remedy all of the cracking because minority communities in other portions of DFW remain divided, and they contend that it does not remedy all of the packing in CD30 because CD30 needs far fewer minority votes to continue functioning as an African-American ability district, and those excess minority votes are thus being wasted. They contend that, together, the remaining cracking and packing prevents the creation of additional minority opportunity districts. The Court has already found, however, that Plaintiffs failed to demonstrate that additional minority opportunity districts with cohesive minority communities could be drawn. In addition, the fact that CD30 has a higher-than-necessary minority population is not itself unlawful packing. That higher-than-necessary minority population was in CD30 in the benchmark, thus Downton did not put those voters into CD30 with a discriminatory purpose when he drew Plan C185. And while Plaintiffs contend that those voters could be placed into other districts to create additional opportunity districts, the failure of their *Gingles* claims shows that removing these voters would not create additional single-minority or minority coalition districts. Thus, the Court finds that

---

Texas v. United States, 887 F. Supp. 2d at 222 (fact finding 120). This packing was remedied by Plan C235.

Plan C235 adequately remedies the cracking and packing found by this Court.

Last, the Quesada Plaintiffs further indicate that this Court should fix the cracking of southeast Arlington/Grand Prairie found by the D.C. Court because it remains in Plan C235. Quesada Plaintiffs note that, in the section of its fact findings and conclusions of law entitled "Discriminatory Purpose in the Congressional Plan," the D.C. Court included the following finding:

> 112. CD 33 is one of the State's newly apportioned congressional districts. In the Congressional Plan, this district includes all of Parker County and parts of Wise County, both of which are predominantly comprised of Anglo, suburban areas. Anglos make up 85.3% of the population in Parker County and the portion of Wise County included in CD 33 is 78.7% Anglo. Pl.'s Ex. 12. In addition to those Anglo areas, CD 33 cuts into Tarrant County to include Tarrant County's fast-growing minority populations. Representative Veasey testified that enacted CD 33 "goes around southwest—underneath southeast Ft. Worth in the unincorporated Tarrant County, and then moves into Arlington, into the heavily Anglo part of Arlington, and then picks up the fast minority growth area in southeast Tarrant County, Arlington—southeast Arlington–Grand Prairie area." Trial Tr. 23, Jan. 18, 2012 PM (Rep. Veasey).

887 F. Supp. 2d at 220. The D.C. Court did not find that this particular cracking was unlawful, however. In an area with many minority communities, it is inevitable that

some minority communities will remain cracked, and they cannot all be placed into a minority opportunity district. Because cracking this community has not been shown to intentionally or in effect prevent the creation of an additional opportunity district or to minimize minority influence, uncracking is not required.

As a result, the Court finds that Plaintiffs' intentional discrimination/vote dilution claims as to Dallas County fail as to Plan C235. No additional remedies are required in the DFW area.

IV. Houston area

Plaintiffs asserted § 2 results and statutory and constitutional discrimination claims in the Houston area with regard to Plan C185. With regard to the § 2 results claims, the Court found that Plaintiffs had failed to establish the first *Gingles* precondition for their proposed districts , but this did not preclude Plaintiffs from pursuing these claims with regard to Plan C235 with population data reflecting the minority population in 2013, when Plan C235 was adopted. Docket no. 1390 at 146-158. The Court did not find sufficient evidence of racial gerrymandering or racially discriminatory motive. *Id.* at 158-163. Though there was some circumstantial evidence consistent with racial discrimination, the Court ultimately found that Plaintiffs failed to sufficiently distinguish the role of race and politics in the drawing of district lines in Houston. *Id.* at 162.

The NAACP Plaintiffs and MALC bring § 2 results claims in the Houston area with regard to Plan C235. Docket no. 897 (MALC) ¶¶ 60-61. MALC proposes new

coalition districts in Plan C285, and NAACP joins in MALC's plan.

Dr. Murray testified in 2011 that there is Latino growth outside of CD9 and CD18 in Houston, which would have an impact on the ability to draw a new Latino opportunity district because "there's a lot of raw material to work with." Tr1283. He testified that there was growth in the southeastern part of the county, some in the present CD29, but there was also a lot of growth in CD22 and CD36. He also testified that districts 2 and 7 contain substantial areas of heavily Latino voter concentrations. Tr1283-84. He felt that a functional Latino opportunity district could be added, though he had not seen a plan creating a new HCVAP-majority district. Tr1273-74.

In Plan C235, CD29 is an HCVAP-majority (61.6%) district that consistently elects an Anglo Democrat, and CD9 and CD18 are near majority-BCVAP (48.5% and 47%, respectively) districts that consistently elect African-American Democrats. MALC offers the only demonstration plan for the Houston area in this phase, Plan C285, which proposes two additional minority opportunity districts—it maintains the existing African-American districts as ability districts, creates a new HCVAP-majority district, reworking CD29 into a coalition district, and creates an additional coalition district. JX-104. Expert George Korbel drew Plan C285, and he testified that he tried to simplify the existing minority districts while creating two additional minority opportunity districts. Tr736.

He created new HCVAP-majority (50.7%) district CD36 that he characterized as a "ship channel district" that includes Galena Park and Pasadena, South Houston,

Baytown, and Channelview. Tr736-37. CD34 is a new B+HCVAP coalition district (53.3%) dominated by Acres Homes, Studemont, and Oak Forest and the areas in the Spring Branch Independent School District that are north of I-10. Tr736-37. CD18 is the "traditional black district" that was "simplified" and includes Third Ward, Fifth Ward, Montrose, Kashmere Gardens, and black neighborhoods all throughout the center part of Houston. Tr737. Both its BCVAP and HCVAP are reduced from Plan C235 and it becomes 40.2% BCVAP and 18.2% HCVAP. JX-104.3. CD29 includes Aldine and parts of Spring Branch and Sharpstown and Gulfton. Tr737. It is no longer majority-HCVAP but is a 37.6% HCVAP + 16.5% BCVAP coalition district. JX-104.3; Tr738, Tr742. CD9 was then modified "slightly" to fit in with the other districts as a south Harris County district with virtually all the neighborhoods that were in CD9. Tr737-38. Both its BCVAP and HCVAP are reduced from Plan C235 to 41.4% BCVAP and 18.4% HCVAP.

Korbel testified that he tried to put these districts entirely within the urban areas, and in doing that, created five minority districts; all of the districts consistently functioned over the test period for Democrats in the exogenous elections. Tr738; Tr742 (new CD34 and CD36 perform consistently for minority voters); MALC-25.

As with DFW, the minority population (this time also significantly more Asians) grew in the Houston area, and Anglo population declined. But as in DFW, no party has proposed additional single-minority-majority-CVAP districts in the Houston area. Although Plan C285 does create a new HCVAP-majority district, CD29 loses its HCVAP-majority status. Thus, as in DFW, Plaintiffs

must rely on proposed coalition districts to meet the first *Gingles* precondition. Defendants contend that Plaintiffs have failed to prove cohesion in the Democratic primaries, and thus cannot meet their burden under the second *Gingles* precondition.

In 2011, several witnesses testified generally about a "Black and Brown coalition" in Houston. *E.g.*, docket no. 1340 at 373 n.52. Congressman Green testified that African-American and Latino communities within his district had worked together to elect Sheriff Adrian Garcia, the first Latino sheriff. Docket no. 1340 ¶ 564. Rep. Senfronia Thompson, an African American, testified that African Americans, Latinos, and Asians work in cooperation together politically. Docket no. 1364 ¶ 503. She testified that she receives Latino support and that she has supported many Latinos. *Id.*

It is generally undisputed that, here, as elsewhere, African Americans and Latinos choose primarily to participate in the Democratic primaries. In Harris County, Dr. Lichtman found that 86.76% of Hispanic and 97.87% of Black voters participated in the 2008 Democratic primaries, and 53.46% of Hispanic and 94.12% of Black voters participated in the 2010 Democratic primary. Joint Expert Ex. E-3 at 5; *see also* docket no. 1364 ¶ 502 (noting that Murray found "almost zero black population voting in the Republican primaries and very, very little Hispanic population"). It also undisputed that African-American and Latino voters coalesce around the Democratic candidate in the general election, as shown through both lay witness and statistical evidence.

But Dr. Murray and the African-American Congressperson Intervenors were concerned about the C185 configuration in Houston's African-American districts creating "tension," where African Americans and Latinos would compete for control over districts as Latino population increased in the African-American districts. Docket no. 1340 ¶ 566. Dr. Murray testified that such tension is more likely when representatives are not consulted in the drawing of the districts. Tr1284-85. Congressman Green testified that, when one group has a plurality, the two groups can work well together through a "gentle person's agreement" to back candidates from the plurality, but when there is no plurality, tension may develop because both groups want representation. Docket no. 1340 ¶ 567.

Murray agreed that, if Hispanic and African-American populations were balanced about evenly in a district, "you are going to get some tension in Democratic primaries." *Id.* ¶ 566 n.52. He agreed that, in the primary, African Americans tend to vote for African Americans and Hispanics for Hispanics. *Id.*

Dr. Alford notes that in proposed CD34 in Plan C285, the combined BCVAP is at 25% and HCVAP is at 28.6%, and MALC has not offered primary analysis for this proposed district. He testified,

> If we had no other information, we might assume that it reflected a kind of perfect combined minority district because the population numbers suggest that it's pretty evenly divided between the two groups. If they're politically cohesive, that might be just the right way to draw that district.

> We know from the Harris County primary analysis, Dr. Engstrom, that the two groups are not politically cohesive, and we know from the experience in CD33 how that typically would play out. So this is a district that's . . . if it was implemented, likely to be characterized a few years from now as black opportunity district.

Tr1378.

As noted by Dr. Alford, Dr. Engstrom's statistical analysis indicates a lack of Democratic primary cohesion between African-American and Latino voters, with African Americans sharing support for the Latino candidate with Latinos for only two of six candidates in Harris County between 2006 and 2010. Docket no. 307-1 at 16. In several primaries, African-American support for the Latino candidate was lower than "others." Docket no. 307-1 at 17-18. Dr. Engstrom's results are set forth in the following table:

Harris County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	28.0 24.9 - 31.0	39.5 36.1 - 42.7	38.3 36.5 - 40.2
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	43.5 39.0 - 47.9	43.4 40.6 - 46.3

2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.5 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.7 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	37.8 36.4 - 39.2	67.6 64.5 - 70.7	31.1 29.6 - 32.6
2010 Dem. Primary Land Comm'r (Uribe)	69.6 68.2 - 70.9	59.0 55.5 - 62.6	46.3 44.7 - 47.9
2014 Dem. Primary Governor (Madrigal)	1.7 0.2 - 2.9	31.8 29.0 - 34.8	.1 0.0 - 0.3

Dr. Chervenak only looked at one primary election in Harris County, the 2016 HD149 Democratic primary, where he measured support from various groups for the

Asian candidate Hubert Vo. He found that all the various groups shared similar levels of support for Vo: African Americans at 56.4%, Latinos at 60.6%, Asians at 62%, and White voters at 55.4%. NAACP-2 at 20. Thus, this does not tell us much about a particular African American and Latino coalition.

While there may not be as much evidence indicating a lack of primary cohesion in Houston as there is in DFW, neither is there much evidence proving primary cohesion Considering all the evidence, Plaintiffs have failed to satisfy the burden of proving minority group cohesion in Houston. The § 2 results claim in the Houston area fails.

V. CD23

Several Plaintiffs challenged the configuration of CD23 in Plan C185, arguing that it was racially gerrymandered by applying the "nudge factor," in which Hispanic population and turnout were manipulated to make CD23 appear to be a Latino opportunity district when in fact it was not. The Task Force also asserted a *Shaw*-type racial gerrymandering claim against CD23.

In the § 5 preclearance litigation, plaintiffs asserted retrogression and discriminatory purpose claims. Plan C235 incorporated changes to CD23 that attempted to address the "not insubstantial" claims that CD23 was impermissibly retrogressed from the benchmark in Plan C185. Docket no. 691 at 31. At the time the Court considered adopting Plan C235, the parties disputed whether CD23 was effectively adjusted to avoid retrogression, with MALC and certain other Plaintiffs arguing that its performance was below benchmark levels

because in almost all elections, the choice of Hispanic voters did slightly more poorly.[71]

Dr. Ansolabahere compared the proposed CD23 in Plan C226 to CD23 in the benchmark in February 2012 as this Court was evaluating the proposed compromise plan. Rod-916 (Analysis of CD23 under Plans C100 and C226). He noted that the HCVAP increased from 59.3 to 60.6%, but that performance for Hispanic-preferred candidates decreased by about one-to-two percentage points in every election he studied, with an average reduction of 1.5%, although the number of wins did not change. Although CD23 was better than in Plan C185, he viewed it as reducing ability to elect from Plan C100.

However, because CD23 in Plan C235 maintained comparable win-loss records on various election indices,[72] the Court concluded that it had been sufficiently restored to benchmark performance levels to avoid retrogression, even if the margin of victory slightly decreased. Docket no. 691 at 31-32. Further, because Plaintiffs argued that CD23 in the benchmark was an opportunity district and its performance on the various indices was similar in Plan

---

[71] The Task Force Plaintiffs stated that CD23 as altered in Plan C226 "restore[d] CD 23 as a Latino opportunity district" and noted that the win-loss record of Latino-preferred candidates was similar to the benchmark. Docket no. 638 at 35. The Task Force stated that "[t]he restoration of CD23 in C226 addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." *Id.* The Task Force did not assert claims against CD23 in Plan C235, and the Court denied the Task Force's motion for leave to amend to pursue such claims shortly before this trial in 2017.

[72] This included the OAG 10, Dr. Handley's index, and Dr. Engstrom's index.

C235, the Court found that Plaintiffs' § 2 claims were resolved, and the Court also did not need to decide the discriminatory purpose claims related to CD23. *Id.* at 32.

In its Order on Plan C185, this Court found that the Task Force Plaintiffs succeeded on their *Shaw*-type racial gerrymandering claim as to CD23, that CD23 was no longer an opportunity district despite its HCVAP-majority status, and that mapdrawers intentionally discriminated against Latino voters and diluted their vote in violation of § 2 of the VRA and the Fourteenth Amendment through the use of the nudge factor. Docket no. 1390 at 11-32.

MALC, the Rodriguez Joint Plaintiffs, and Congressman Cuellar assert claims against CD23 in Plan C235 on the basis that it did not fully remedy the intentional vote dilution and intentional discrimination behind the district lines in Plan C185. The Rodriguez Joint Plaintiffs contend that CD23 continues to run afoul of § 2 despite the adjustments made in Plan C235. Docket no. 1524 at 15. The Court must thus determine whether CD23 as reconfigured in Plan C235 is a Latino opportunity district and whether the harms inflicted in 2011 are remedied.

First, however, the Court considers Defendants' assertion that these Plaintiffs lack standing to challenge CD23.[73] *See* Docket no. 1526 at 74 n.14. MALC has identified "multiple members of its organization who reside in CD 23 or who have districts within the

---

[73] Between closing argument and their closing briefs, CD23 is the only area in which Defendants raise a specific challenge to the standing of any Plaintiff.

geographic constraints of CD 23." Docket no. 1532 at 1. MALC notes that it previously identified Rep. King as a resident and voter in CD23 in docket no. 258 and also identified additional MALC members who were residents of CD23. *Id.* at 2. Further, MALC member Poncho Nevarez represents and resides in HD74, which is entirely contained within CD23. MALC-1.

MALC has proven its standing to assert claims against CD23.[74] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Com'n*, 432 U.S. 333, 343 (1977). First, as noted, at least one MALC member would have standing to sue in his or her own right as a resident of CD23.

Second, the interests sought to be protected—Latino voter strength and representation in Texas's congressional districts—are germane to MALC's purpose. Tr145 (testimony of Rep. Martinez Fischer that MALC looks to develop membership that will take into

---

[74] To the extent that other Plaintiffs also assert these claims, the standing of MALC is a sufficient basis for this Court's analysis. *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 501 n.18 (5th Cir. 2004) ("[W]hen one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs."); *see also* docket no. 1365 at 116 n.72 ("[T]he Court rests its analysis of the merits on the standing of LULAC, which covers all of the *Larios* claims in the lawsuit.").

account the views of the minority community when it comes to public policy and voting rights). Because MALC is an association of Texas House members, Defendants argue that "the configuration of congressional districts is not germane to the organization's purpose." Docket no. 1526 at 74 n.14. Although the configuration of congressional districts is not *itself* MALC's purpose, that is not what the law requires. The interest to be protected need only be *germane* (*i.e.*, relevant) to MALC's purpose, which is a "low threshold"—"the germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quoting *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006)). Here, the configuration of congressional districts overlaps in important ways with MALC's purposes of growing membership and representing Latinos in Texas. MALC's ability to accomplish both of its goals is strengthened by increased Latino political power in congressional districts, even though the strengthening of Latino political power in congressional districts is not itself MALC's purpose. At the very least, MALC's challenges are "pertinent" to the purposes identified by Representative Anchia.

Third and finally, participation of individual MALC members is not necessary and Defendants do not argue otherwise. Accordingly, MALC has standing to assert its claims in CD23, and as a result, the Court finds it

unnecessary to conduct a detailed standing analysis for other Plaintiffs.[75]

---

[75] The Fifth Circuit has recognized various Supreme Court decisions that give courts "license to *avoid* complex of questions of standing in cases where the standing of others makes a case justiciable." *Nat'l Rifle Ass'n of Am. v. McGraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013) (emphasis original) (citing *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007) and *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986). The Fifth Circuit has cautioned, however, that "it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case." *Id* (emphasis original). The procedural posture of this case and Defendants' standing challenge permits the Court to rest its analysis of multiple plaintiffs' claims on the standing of a single plaintiff. This case has been pending for six years, but after Defendants challenged standing at the motion to dismiss stage, they have not formally re-asserted their challenges by seeking summary judgment or specifically seeking dismissal as to any particular plaintiff on specific grounds. Thus, so long as a single party has standing to assert a particular challenge, the Court will assess the record as to that claim, regardless of whether other plaintiffs have standing to assert the same claim.

However, the Court notes that, even if MALC lacked standing here, LULAC also has a strong case for associational standing. This Court has admitted a declaration from LULAC's Texas State Director, Elia Mendoza, who states that LULAC has councils in Maverick and Val Verde Counties (which are in CD23), that each council has an officer and a contact person, and that there are multiple LULAC members who are registered voters in CD23 (though none are identified by name). Docket no. 1365 at 118 (2011 House Plan Opinion); docket no. 1342-1 (Mendoza declaration). In addition, Congressman Cuellar is the elected representative of CD28, which borders CD23 to the southeast, but is not a voter in CD23. However, elected officials may have standing to protect their interests as district representatives, including "the 'ability to protect their continued tenure,'" and restructuring of CD23 could affect Cuellar's

The parties are in agreement that the Hispanic voters in CD23 have a right under § 2 that the State must accommodate, but they disagree on whether CD23 as configured in Plan C235 is a Latino opportunity district. In Dr. Alford's March 2014 Supplemental Report (D-424), he opined that CD23 "is a politically competitive district that nonetheless provides an opportunity for Latinos to elect their candidate of choice." D-424 at 26; *id.* Table 6 (in C100 CD23 was 2 Democrat wins, 4 Republican wins; in C185 it was 0 Democrat wins, 6 Republican wins; in C235 it was back to 2 Democrat wins, 4 Republican wins). He asserts that, throughout its modern history, CD23 has been a highly competitive congressional district, producing victories for Hispanic Republicans during Republican tides, and producing victories for Hispanic Democrats during Democratic tides. He further notes that, if opportunity requires a demonstrated opportunity for Hispanic voters to elect a candidate of choice, then that has been empirically demonstrated for CD23 because in 2012, Pete Gallego defeated incumbent Francsico Canseco with 50.3% of the vote.

Dr. Alford's more recent analysis reflects an endogenous success rate of 33% (1/3 elections) and a success rate of 12% (3/25) on reconstituted statewide elections. D-878 at 16-17, 20; Tr1431 (Alford). Dr. Alford

---

district. *LULAC Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) (quoting *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1572 (N.D. Ill. 1988)); *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 844 (5th Cir. 1993). In any event, the Court again reiterates that it need not decide this question of Congressman Cuellar's standing individually because he asserts the same claims as MALC, which has standing for the reasons described above.

agreed that the district will more often than not elect the Anglo-preferred candidate in endogenous elections, favors the Anglo-preferred candidate in 88% of exogenous elections, and is designed to tilt in favor of Anglo-preferred candidates. Tr1389, 1402, 1430-31. But he still believes that CD23 provides the opportunity required by § 2. Plaintiffs contend that CD23 does not perform for Hispanic voters by electing their candidate of choice in a legally significant number of elections.

A majority-minority district must provide "real electoral opportunity" to the minority group in order for the § 2 right to be fulfilled. *See LULAC*, 548 U.S. at 428. "A 'real opportunity' is not a guarantee of success, as the Court is mindful that § 2 does not guarantee electoral success for minority-preferred candidates." *Perez*, 2017 WL 1787454, at *8 (citing *LULAC*, 548 U.S. at 428). CD23 satisfies § 2 if it offers Hispanic voters the real opportunity to elect their candidate of choice. We are in a unique position to evaluate that question with actual election data because of the peculiar posture of this case. Three endogenous elections have taken place in the district under the Plan C235.

When the current configuration of CD23 was adopted, the HCVAP was 61.3%, an increase from 58.5% HCVAP in the 2011 plan. The most recently available ACS five-year survey data (2011-2015) places the HCVAP at 62.1%. The SSVR in CD23 was stable across all three elections for which C235 has been in place: 55.6 , 55.9, and 55.3%, respectively.

From the 2012 to the 2016 election, Hispanic turnout increased from 46% to 48.2% of the turned-out vote, with a dip in the 2014 midterm election to 40.9%. This increase

in Hispanic turnout led to a decrease in the vote gap between Hispanic and non-Hispanic voters from 16,075 in 2012 to 8,506 in 2016. Looked at another way, it reflects a 20.7% increase in the number of Hispanic voters and a 10.7% increase in the number of non-Hispanic voters.

Dr. Ansolabehere analyzed the Democratic vote totals in the areas moved in, moved out, and kept in the CD23 when compared to C185. He concluded that the areas that were brought into the district, while Democratic, contained insufficient votes to overcome the vote totals for Republicans in the areas that were kept in the district. This left Democrats with a vote deficit of approximately 8,000 votes. Rod-955 (Ansolabehere report) at 15. Such analysis has limited value for reviewing CD23's performance because we can look to the actual election results in three endogenous elections, which in this case demonstrate the opportunity Hispanic voters have to elect their candidate of choice in CD23.

The Hispanic candidate of choice—Democrat Pete Gallego in all three elections—was elected in 2012, but was narrowly defeated by African-American Republican Will Hurd in 2014 and 2016. Gallego won in 2012 by a margin of over 9,000 votes. Gallego's margin of defeat in 2014 was about 2,000 votes and his margin of defeat in 2016 was about 3,000 votes. Both Dr. Engstrom's bivariate and Dr. Alford's multivariate ecological inference analyses of CD23 demonstrate that Gallego lost Hispanic vote share from 2012 to 2016. Engstrom's bivariate analysis shows his Hispanic support declining from 86.9 to 82%. Alford's multivariate analysis shows Gallego's Hispanic support declining from 82.6 to 76.2%. Dr. Alford testified that a 4% drop in support among

Hispanics, smaller than either Engstrom or Alford's analyses demonstrate, would result in a more than 3,000 vote decrease for Gallego. Had Gallego retained his support among Hispanic voters, particularly in an election in which Hispanics were also gaining vote share over 2012, Gallego would have defeated Rep. Hurd.[76] The

---

[76] Dr. Alford disagreed with Dr. Flores's conclusion that Gallego lost because of increased racial polarization in the district. Tr1400. Dr. Alford noted that Gallego's Anglo support increased from 23.9 in 2012 to 26.85% in 2014, which is not unexpected since he was the incumbent, but Hispanic turnout dropped more dramatically than Anglo turnout in the non-presidential election year. Tr1393-96. Thus, although both Latino and non-Latino support for Gallego increased, the relative proportions in the electorate that are Hispanic and Anglo are different in that midterm, and "it's an electorate that's less helpful to an Hispanic candidate," such that Gallego loses. Tr1397. Alford further noted that, in 2016, Gallego is not the incumbent, and Hurd is. Hurd is getting 74.8% of the Anglo vote; Gallego is down at 22.4%. Gallego is at 76.2% Hispanic support and Hurd at 19.1%. Tr1394. In terms of Hispanic support, Gallego is down from 2014, which Alford did not think was unusual because Gallego was running as a challenger rather than as an incumbent and Hurd, the incumbent, has had some time to move from being a candidate to being someone who actually represents the district. Tr1394. Although the proportion Hispanic in the turned-out vote went up by a couple of percentage points, Gallego still lost, and that is where Alford felt the EI analysis explained why—Gallego's support among *both* Hispanics and Anglos dropped. Tr1398-1400. Alford felt this was not increased racially polarized voting because Gallego was defeated in 2014 in an election when his level of support increased in both Anglos and Hispanics, and he was defeated again in 2016 when his level of support decreased in both Anglos and Hispanics. Tr1400-01. Thus, Alford indicated, the 2014 defeat was due to a decrease in relative turnout, and the defeat in 2016 was due to a decrease in Hispanic cohesion in support of Gallego (as well as a decrease in Anglo support). *See also* Tr1065 (Ansolabahere) (noting that if there is a small difference in turnout in

competitiveness of these elections is sufficient to find that CD23, as currently configured, is a Hispanic opportunity district.

The exogenous elections over the previous three cycles show less success for the Hispanic candidate of choice in the district. Under the current plan, the Hispanic candidate of choice was successful in three of twenty-five exogenous elections in CD23.[77] The Rodriguez Plaintiffs contend that "an abysmal 12% success rate is far below any of the indices this Court cited in its discussion of benchmark CD23" and, unlike CD23 in Plan C100, the endogenous success rate is also low (33% compared to 66% in Plan C100). Docket no. 1254 at 16. But exogenous elections are far less probative than the actual endogenous election data we have. We have also rejected a pre-set success rate for the minority preferred candidate in exogenous elections. *Perez,* 2017 WL 1787454, at *8. Such a requirement is not compatible with the Supreme Court's directives that § 2 requires a searching, practical inquiry specific to the facts of each case. *Id.* We know that CD23 may still perform for minority-preferred candidates even when its performance on statewide indices is equal to or less than 50%. Although a 33% endogenous success rate is undoubtedly less than the 66% we considered to provide opportunity in CD23 in

---

the favor of the Hispanic-preferred candidate, then the district polarization will kind of help cement that as a Hispanic district, but if there is a small deficit in the opposite direction, that will help cement it as a non-Hispanic district).

[77] Korbel's analysis showed that CD23 performed in exogenous elections 0/10 in 2010, 0/5 in 2012, 0/12 in 2014, and 2/8 in 2016. Tr726; Tr743; MALC-25.

Plan C100, as Dr. Alford noted, with only three endogenous elections, one change in win/loss results in a large change in percentage. And the fact that endogenous wins are less than 50% is not dispositive.[78] The evidence indicates that Latinos *can* win elections in the district, and whether they can win in the future is largely within their control.

On the whole, CD23 is a highly competitive district for U.S. Representative candidates. Hispanics have an opportunity to elect a candidate of their choice where merely small changes in cohesion, turnout, candidate quality, or a host of other factors could tip the election in their favor. Section 2 is not meant to be a guarantor of political success and we will not further tinker with the boundaries of CD23 to achieve that end.

Last, the Court considers whether the intentional harms found with regard to Plan C185 continue in Plan C235, despite the changes to the district.[79] In finding that mapdrawers applied the "nudge factor" in CD23 in Plan C185, the Court noted that the Legislature intentionally split Maverick County and the City of Eagle Pass to exclude politically active Hispanics who would not support Canseco, increased the turnout gap between Latinos and Anglos, and increased SSVR while simultaneously decreasing Latino cohesion (and performance) by

---

[78] "The circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428.

[79] As to the *Shaw* claim, to the extent race predominated in Plan C185, the district was redrawn in Plan C235. Even if race predominated in that redrawing, changes to the district were necessary to address intentional discrimination, and thus any use of race served a compelling state interest.

selectively including high SSVR districts with worse performance for Latino-preferred candidates.[80] The Court found that the increases in SSVR and HCVAP were not intended to and did not maintain or improve Latino voting strength. Docket no. 1390 at 22.

In Plan C235, no changes were made to El Paso or the northern border, but Maverick County was made whole and placed within CD23, and Atascosa County was made whole and placed within CD28. Changes were also made to CD20, CD23, and CD28 in Bexar County. The Task Force, one of the principal Plaintiffs groups pursuing the nudge factor claim in CD23, stated that "[t]he restoration of CD 23 in C226 [which became C235] addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." Docket no. 638 at 35.

Dr. Ansolabahere looked at the alterations made to CD23 in Plan C235 and the available information at the time to determine how the district was being reconfigured and if the changes "were fixing specific problems" in terms of increasing turnout or SSVR. Tr1060-61. He noted that although HCVAP was increased, the actual number of Spanish surnamed registered voters barely increased. Tr1061; Rod-955 ¶ 27 (the changes resulted in a net increase of only 243 SSVRs). He noted that this was an indication that maybe the areas being moved in were

---

[80] As the Court noted, although Downton claimed to be trying to include more Hispanic Republicans, his method could also include precincts with low Hispanic turnout and high Anglo Republican turnout or higher Anglo bloc voting levels, and he failed to consider the Hispanic incumbent's chances in the Republican primary. Docket no. 1390 at 21 n.19.

not going to perform to the level that they needed to in terms of participation. Tr1061. He further found that the areas moved into CD23 had lower turnout than the areas moved out of CD23, and that the movement of lower turnout areas into CD23 did not improve, and may have worsened, the electoral opportunities afforded to Hispanics in the district. Rod-955 ¶¶ 28, 30.

Dr. Ansolabahere acknowledged that Plan C235 fixed the Maverick County split and moved the entire County back into CD23, and that both HCVAP and SSVR were increased. Further, although he notes that areas moved into CD23 had lower turnout than areas moved out, his turnout analysis looked only at total turnout, not Hispanic or SSVR turnout, and did not compare Hispanic and non-Hispanic turnout differences. Tr1153.[81]

Dr. Flores's analysis examined the change in SSVR in Latino opportunity districts from 2008 to 2016, and found that the SSVR decreased slightly in CD23 (-0.2%). TF-20 at 3. But he found that it similarly decreased in CD20 (-0.5%) and CD35 (-0.9%). TF-20 at 2. Flores also found that "Latinos were more successful in increasing their number of votes cast when compared to non-Latino voters" but they "could not overcome the total turnout numbers of non-Latino voters." TF-20 at 7. He also found, based on the difference in turnout rates between Latinos and non-Latinos in the 2012 and 2016 general elections, that "[a]lthough Latinos have made gains closing the turnout

---

[81] Dr. Ansolabahere looked at 2010 election turnout because that was the data available to the mapdrawer, but he agreed that Defendants' 2016 election turnout analysis showed an overall increase in turnout. Tr1154-57; DX-808.

gap in 2016 compared to 2012, the participation gap is still substantial at 15.8%." TFX-20 at 7-8.

In his conclusions, Dr. Flores notes that he previously pointed out the "difficulties that Latino candidates of choice would encounter because of the manner in which CD 23 was constructed by the Texas Legislature" in terms of turnout, and that Plan C235 "made some modifications to CD23 in Bexar County as an interim remedy." TF-20 at 12. He then states, "However, since 2012 the challenges facing Latino voters in CD23 have worsened with the increased level of bloc voting by non-Latinos against the Latino candidate of choice." *Id.*[82] But this fails to tie any of the current problems he identifies in CD23 to specific lines drawn in Plan C185. It is not enough to point to problems with CD23 in Plan C185 and problems with CD23 in Plan C235, without connecting the problems in Plan C235 to decisions made in Plan C185 and demonstrating specific continuing harms flowing from Plan C185. While Flores shows that Latinos continue to have a turnout gap compared to Anglo voters, that fact is

---

[82] As noted above, non-Latino bloc voting actually decreased between 2012 and 2014. Dr. Engstrom's analyses show that, between 2012 and 2014, both Latino and non-Latino support increased for Gallego. TF-19. In addition, both Anglo support and Latino support for the Hispanic-preferred candidate were higher in 2012 under Plan C235 than they were in 2010 under Plan C100. In 2010, Engstrom found 84.7% Latino and 18.1% non-Latino support for Rodriguez. Docket no. 307-1 at 25. In 2012, he found 86.9% Latino and 20.8% non-Latino support for Gallego. TF-19. Engstrom also estimated Latinos at 40.77% of the turned-out vote in 2010, while Flores found Latinos to be 46% of the turned-out vote in 2012. Docket no. 307-1 at 25-26; Flores Table 4 (92,997 Latino votes cast in 2012); Flores Table 5 (109,072 non-Latino votes cast in 2012).

true in most areas, if not statewide, and there is simply no evidence for the Court to conclude that the turnout gap in Plan C235 is the result of intentional discrimination in the mapdrawing process or carryover from Plan C185. And while the district may not perform as desired for Hispanic-preferred candidates, the Court finds no persuasive evidence that the lack of performance is the result of intentional discrimination in either 2011 or when the interim map was drawn in 2012.

Based on the foregoing, the Court finds that no changes are required to CD23.

VI. CD35 and CD27

The Rodriguez Plaintiffs contended that CD35 in Plan C185 was an impermissible racial gerrymander in violation of the *Shaw*-line of cases. And several Plaintiffs asserted that the removal of Nueces County from the "envelope" of South and West Texas Latino opportunity districts violated § 2 because Nueces County Hispanic votes were deprived of their opportunity to elect candidates of their choice. Hispanic voters in Nueces County who had been in benchmark Latino opportunity district CD27 asserted § 2 and Fourteenth Amendment claims based on the reconfiguration of CD27 in Plan C185, which placed them in an Anglo-majority CD27 oriented toward the north that was unquestionably no longer a Latino opportunity district.

The Court agreed that CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest. Although a new Latino opportunity district was required in South and West Texas, the Court found that

mapdrawers' placement of significant population from Travis County into CD35 was not to substantially address the § 2 requirement, but to use race as a tool for partisan goals. Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, which mapdrawers knew, and placement of CD35 there was not to address § 2 concerns, but to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25).[83]

---

[83] Relatedly they intended that the CD25 incumbent, Lloyd Doggett, would lose any subsequent election in either CD25, which became a safe Republican district, or in a CD35 primary. Accordingly, they were willing to accommodate requests from Hispanic Democrat legislators from Bexar County to weight the district more heavily toward Bexar County. The result was the least compact district in the plan, designed not for a cohesive Hispanic voting bloc, but to allow Bexar County Hispanics to control elections, hopefully ousting Doggett, an Anglo, if he chose to run in the district. Defendants' plan was not realized, however, since Doggett secured re-election in CD35 despite it being designed to elect a Latino from Bexar County.

Several Plaintiffs also brought intentional discrimination claims based on the alleged intentional destruction of CD25 as a functioning crossover district. Because the *Shaw* equal protection violation would require district lines to be redrawn in Travis County, the Court did not reach that specific claim. Relatedly, Defendants have argued that Plaintiffs cannot establish a § 2 claim in Travis County related to the intentional destruction of alleged crossover district CD25 because the Court found no racially polarized voting in Travis County such that a crossover district would not be required to be drawn there. That argument misunderstands the nature of Plaintiffs' *Bartlett* claim, however. No party has asserted that § 2 requires a crossover district to be created in Travis County. Rather, certain plaintiffs are arguing that the intentional destruction of an existing crossover district, when done with racially discriminatory purpose, violates the Fourteenth

Simultaneously, mapdrawers removed Nueces County and its substantial Hispanic population from the South/West Texas configuration of districts, and placed it in an Anglo-dominated district going northward, not because they wanted these Hispanic voters to have influence in CD27 or because their rights could not be accommodated without other voters' § 2 rights failing to be accommodated, but because they would not vote for the newly elected Anglo Republican incumbent.[84] Placing them in the new Anglo-dominated CD27 would ensure that Anglo bloc voting would prevent them from electing their preferred candidate. Thus, although these Nueces County Hispanic voters had a § 2 right, had been in an opportunity district, and could have remained in one, they were intentionally deprived of their right to elect candidates of their choice.

---

and Fifteenth Amendments. While § 2 does not require states to draw crossover districts, a remedy for the purposeful destruction of an existing crossover district could include recreating the destroyed crossover district.

[84] Even Defendants' expert Dr. Alford agreed in the 2011 trial that CD27 was flipped from a Latino opportunity district to an Anglo-majority district to protect a candidate who was not preferred by the Hispanic voters. Tr1829, Tr1832, Tr1837. In *LULAC v. Perry*, 548 U.S. 399, 441 (2006), the Supreme Court noted that "incumbency protection can be a legitimate factor in districting," but "not all of [its forms are] in the interests of the constituents." Thus, "If . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. . . . This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." *Id.*

In sum, the Court found that the Legislature violated § 2 in both result and intent, as well as the Fourteenth Amendment, by racially gerrymandering CD35 to replace CD25 and simultaneously impermissibly trading the § 2 rights of Nueces County Hispanic voters for those in Travis County, who lacked a § 2 right to a Latino opportunity district. The Court found that seven Latino opportunity districts were required in South and West Texas, and while the Legislature enjoys some discretion in creating such districts and not every voter who demonstrates a § 2 right has a corresponding right to be placed into an opportunity district,[85] the Legislature

---

[85] In its Order on Plan C185, this Court stated that, "Where the rights of voters who have demonstrated § 2 violations can be accommodated through the use of compact districts that do not subordinate traditional redistricting principles more than necessary to address the § 2 liability, those voters' § 2 rights must be accommodated." Docket no. 1390 at 56. This was not meant to imply that any voter with a § 2 right must be placed into a § 2 district, or that Nueces County Hispanics would have had a right to be included in a Latino opportunity district under any circumstances. Rather, Plaintiffs demonstrated that seven compact Latino opportunity districts could be drawn and that § 2 required seven such districts, and the Legislature was required to accommodate those rights. If the Legislature had substantially addressed the requirement for seven Latino opportunity districts while still not including Nueces County, and there was no evidence of improper intent, this would be a different case, and Nueces County Hispanics would not have a right to inclusion in a Latino opportunity district. That is why, at the time the Court adopted the interim maps and had not yet found improper intent with regard to CD27 and CD35 and improper racial gerrymandering in CD35, it concluded that Nueces County Hispanics did not have a right to be placed into a Latino opportunity district. However, with the benefit of examination of the full record, that is not the case.

intentionally did not substantially address the § 2 violation.

The exact same configuration of CD35 and CD27 remains in Plan C235. At the time the Court adopted Plan C235 as the interim plan, it did not alter the configuration of CD35 because it did not have the benefit of the full record and did not find that race predominated. In light of all the evidence and a full consideration of the record, the Court found that its preliminary conclusion concerning race predominance was erroneous. In conducting strict scrutiny review, the Court then determined that the placement of CD35 in Travis County was far from benign.

In addition, at the time the Court adopted Plan C235, it stated that the failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes, since whether they were included or not, no additional compact Latino opportunity district could be drawn. While this remains true, the Court's opinion on Plan C185 did not base its holdings on the mere failure to include Nueces County Hispanics in a § 2 Latino opportunity district, nor on a § 2 effects claim based on the failure to create additional Latino opportunity districts, the claim to which that statement was directed. Rather, the Court found that the Legislature intentionally diluted the vote of Nueces County Hispanics who would not support incumbent Farenthold, while simultaneously trading their § 2 rights to Travis County voters without a § 2 right.

The fact that seven HCVAP-majority districts were drawn in South and West Texas and that no more could be drawn simply does not resolve the issues. The

Legislature racially gerrymandered to create the seven districts, yet *intentionally* failed to substantially address the § 2 violation that required those seven districts. The same facts exist and the same harms continue. Updated evidence indicates that there still is no Anglo bloc voting in Travis County, yet Travis County population makes up almost 31% of CD35. Tr1167 (Ansolabahere); JX-100.2. Using 2010 Census data, there are 215,626 individuals from Travis County included in CD35, about 140,800 of whom are Hispanics. JX-100.2. Dr. Ansolabahere testified that 220,000 Nueces County Hispanics are stranded in CD27, a district with 44.6% HCVAP. Tr1162-63.[86]

The Rodriguez Plaintiffs maintain their *Shaw*-type claim against CD35, and their intentional discrimination claim related to the destruction of CD25. Docket no. 1524 at 3 & n.8.[87] The Rodriguez Plaintiffs note that the lines of CD35 have not changed, that it remains the least compact district in the state, and that the same population suffers from the State's unjustified race-based classification in Plan C235. Docket no. 1254 at 13. The Rodriguez Plaintiffs also correctly point out that discriminatory intent is not an element of a *Shaw*-type racial gerrymandering claim, and thus the only inquiry remains whether race predominated in the decision to place a significant number of voters within and without the district and, if so, whether strict scrutiny is satisfied. Because the lines of CD35

---

[86] Nueces County is now 57.55% HCVAP; there are 218,400 Hispanics in Nueces County, 205,990 Hispanic citizens, and 142,230 HCVAP. Tr1163; D-702.

[87] Other Plaintiffs, including MALC and the NAACP Plaintiffs, also maintain claims related to the intentional destruction of CD25.

remain identical to the lines in CD35, Rodriguez Plaintiffs note that the evidence is largely the same. Docket no. 1254 at 14.

Defendants contend that, although this Court found CD35 to be an unconstitutional racial gerrymander in Plan C185 and CD35 remains unchanged in Plan C235, there is no unconstitutional racial gerrymander in Plan C235 because the Legislature "did not draw the boundaries of any district" and "did not make a 'decision to place a significant number of voters within or without a particular district.'" Docket no. 1526 at 85. As discussed above, this argument lacks merit, as it improperly focuses on the re-enactment of a plan containing CD35, rather than the decision as to which voters to place within and without the district at the time that decision was made (in 2011).

Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district under *Shaw*. Otherwise, a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan and claiming that it made no decisions about who to include in the district at the time of re-enactment. There is no evidence that the Legislature again considered in 2013 which persons to include within CD35 (and Defendants deny that any such decisions were made in 2013), or that it considered any evidence to provide a strong basis in evidence that did not previously exist in 2011. Rather, as the Court found above, it maintained these aspects of Plan C235 in spite of the possibility that such infirmities remained. Thus, this

Court's prior findings and conclusions concerning CD35 remain equally applicable to Plan C235.

With regard to the Nueces County and CD27 claims,[88] the Court found that these Hispanic voters were intentionally deprived of their opportunity to elect a candidate of their choice, which they likely would have done in the next election given that Hispanic turnout is greater in presidential election years, and that their rights were essentially traded to Hispanics in Travis County without a § 2 right. There is no evidence that the Legislature engaged in any meaningful deliberation in 2013 to cleanse away such discriminatory intent, and in fact they intended to maintain any such discrimination, purposefully intending to deprive plaintiffs of any remedy.[89]

Therefore, the Court holds that the Plan C235 configurations of CD35 and Nueces County/CD27 remain violations of § 2 and the Fourteenth Amendment and must be remedied.

---

[88] MALC, the Perez Plaintiffs, the Quesada Plaintiffs, LULAC, and the Rodriguez Plaintiffs maintain claims against CD27 in Plan C235 on behalf of Nueces County Hispanic voters. MALC's membership includes Abel Herrero, who represents and lives in HD34 in Nueces County. MALC-1.

[89] Plaintiffs' most recent demonstration plans split Nueces County to accommodate the Legislature's goal of protecting incumbent Farenthold within CD27. All of Nueces County can be placed into a Latino opportunity district, but the county is split to place Farenthold in an Anglo-majority district. To the extent such a split might be objected to as failing to respect county boundaries, that traditional redistricting principle is not being subordinated to race, but to the Legislature's goal of protecting Farenthold.

Plan C235 Summary and Conclusions

In Part II, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

In Part IIIA, the Court concludes that Plaintiffs' § 2 results claims in the DFW area fail for lack of proof of African-American and Hispanic cohesion. In Part IIIB, the Court finds that the intentional discrimination found in DFW in Plan C185 is remedied in Plan C235, and that Plaintiffs failed to prove that any alleged cracking and packing that remains in DFW was intentionally dilutive.

In Part IV, the Court concludes that Plaintiffs' § 2 results claims in the Houston area fail for lack of proof of African-American and Hispanic cohesion.

In Part V, the Court finds that CD23 is a Latino opportunity district and there is no evidence of intentional discrimination/dilution.

In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.

It is therefore ORDERED that the Office of the Attorney General file a written advisory within three

business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered.

If the Legislature does not intend to take up redistricting, the Court will hold a hearing to consider remedial plans beginning on **September 5, 2017 at 8:30 a.m.** in Courtroom 1. In preparation for the hearing, the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide congressional plans that remedy the violations found in CD35 and CD27 yet minimize the effect on adjoining districts.

The parties must confer and address objections and concerns, to the extent possible, prior to the hearing. If both sides agree upon a remedial plan, they should notify the Court, but the hearing will nevertheless proceed so the parties can present the plan on the record. If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing. Plaintiffs and Defendants will be permitted to offer up to four alternative remedial plans per side, and Plaintiffs may (but are not required) to jointly offer plan(s). The plaintiffs who asserted and prevailed on their claims against CD35 and Nueces County/CD27 (MALC and the Rodriguez plaintiffs (proceeding jointly with the LULAC and Perez plaintiffs)) should take the lead in drawing and proposing any remedial plans, and the remaining plaintiffs (NAACP, Latino Redistricting Task Force, Congressman Cuellar, and the Quesada plaintiffs) may participate in an advisory role and assert any objections or concerns they may deem appropriate.

The parties should consult with Texas Legislative Council, to the extent necessary, to upload their proposed remedial plans into DistrictViewer and ensure that all relevant data is available to all parties and the Court. If the parties intend to rely on data or analysis that is not available through TLC, they must provide that data to all other parties as soon as that data is available.

It is further ORDERED that Texas Legislative Council staff be present at the remedial hearing for technical assistance in the parties' presentation of their proposed plans through DistrictViewer or other available means.

Because this order only partially addresses the issues herein – the violations in C235 – it is interlocutory. The Court bifurcated the remedial phase, which will commence as scheduled herein. The Court must also address the alleged violations in H358 and, if necessary, a remedial plan for the Texas House.

SIGNED this 15th day of August, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX F

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ADVISORY

This Court recognizes the effect of the temporary stay entered by the Circuit Justice, but sees nothing in the order that would prohibit the parties from voluntarily exchanging their proposed remedial maps, conferring, and attempting to reach an agreement or understanding on certain aspects of the remedial maps so that in the event the stay is vacated by the Supreme Court this matter may be resumed expeditiously.

SIGNED this 28th day of August, 2017,

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX G

U.S. Constitution Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10301

§ 10301. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

APPENDIX H

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 8, 2013

The Honorable Joe Straus
Speaker, Texas House of Representatives
Post Office Box 2910
Austin, TX 78768

Dear Speaker Straus:

When the Supreme Court issues its ruling in *Shelby County v. Holder*, the Texas redistricting case will return to the San Antonio court for further legal proceedings. The best way to avoid further intervention from federal judges in the Texas redistricting plans, and ensure an orderly election without further delay or uncertainty, is to enact the interim maps during the regular session. These maps already have the approval from the federal judges overseeing this litigation. Enacting the interim plans into law would confirm the legislature's intent for a redistricting plan that fully comports with the law, and will insulate the State's redistricting plans from further legal challenge.

Sincerely,

Greg Abbott
Attorney General of Texas

GA:ra

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548
TEL:(512)463-2100 WWW.OAG.STATE.TX.US
An Equal Employment Opportunity Employer · Printed on Recycled Paper

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 18, 2013

The Honorable Kel Seliger
Texas Senate
Post Office Box 12068
Austin, Texas 78711

The Honorable Drew Darby
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768

Dear Senator Seliger and Representative Darby:

You recently received a letter from Jose Garza, the Mexican-American Legislative Caucus's redistricting counsel, concerning pending legislative proposals to adopt the 2012 court-ordered interim redistricting plans as the State's permanent redistricting maps. Mr. Garza's letter contains multiple statements and misrepresentations that do not merit a response. But to prevent you from being misled, I will provide you more information about a few of the issues raised by Mr. Garza.

First, Mr. Garza notes that federal judges in Washington, D.C. have ruled that two of the redistricting plans adopted by the Legislature were created "with a discriminatory

purpose." Indeed, they did. In fact, the D.C. court concluded that all three maps were tainted by evidence of discriminatory purpose. That is exactly why you should take action. The Legislature has both the opportunity and the obligation to remove that specter of discrimination. That is why I have been counseling leadership that the best way to remedy the violations found by the D.C. court is to adopt the court-drawn interim plans as the State's permanent redistricting maps.

Evidently Mr. Garza believes that the interim maps crafted by three federal judges are burdened by discriminatory purpose or other violations of the Voting Rights Act. The interim maps were not drawn by or voted on by the Texas Legislature. I don't believe — as Mr. Garza does — that the federal judges ordered the 2012 elections to proceed under maps that incorporated racial discrimination. And indeed, the interim maps remedy every legal violation found by the D.C. court.

Mr. Garza faults my proposed resolution to the protracted and contentious redistricting litigation, calling it an "end-run around the judicial process on redistricting." If he is accusing me of attempting to avoid further litigation, I confess.

Far from being an "end-run around the judicial process," my proposed solution recognizes that the Constitution gives to states the prerogative – and primary responsibility – for redistricting. The Supreme Court has repeatedly emphasized that redistricting is first and primarily a legislative function belonging to the states. *See, e.g., LULAC v Perry*, 548 US 399, 414-15 (2006). The Texas Legislature – not a federal court – should have the ultimate word on the State's redistricting maps. You should reject Mr. Garza's solicitation to abdicate Texas' sovereign responsibility. You should not cede to federal courts a responsibility that is first and foremost yours. At this moment, you have control. After the session, you lose control.

Mr. Garza also states that enacting the interim plans would occur "without meaningful input from the minority community." That is wrong. Mr. Garza ignores the fact that the interim maps were drawn with the input and approval of a significant number of the minority groups challenging the State's redistricting maps – even if he himself held out for more. You should also know that Mr. Garza and MALC participated in the interim map-drawing process by submitting their own proposed interim plans – they were rejected by the federal court.

Moreover, any legislative approval of the interim plans should – and will – be done through the normal legislative process, which will include full public notice and hearing for the very purpose of gaining "meaningful input" from all Texans, including the minority community.

He also suggests that passing the interim maps will inject additional delay and confusion into the election process. To the contrary, the interim maps have already met with the approval of the federal judges overseeing the redistricting litigation and are the very same maps that Texans voted under during the 2012 election cycle. On the other hand, MALC's proposed interim plans, which if made permanent would significantly alter current legislative districts, have already been rejected by the federal judges who crafted the interim plans. If MALC continues to push for overreaching alterations to the maps the only certainty is prolonged litigation.

Contrary to Mr. Garza's suggestion, the surest way to ensure continuous redistricting litigation and inject further delay is for you to do nothing. If you fail to pass the interim maps, it will likely take several years to resolve the current redistricting litigation (and ensuing appeals), ensuring that Texas' elections will for years to come be mired in confusion or delay or both. As I stated in my March 8 letter to House Speaker Joe Straus, the best way to decrease voter confusion and to end unnecessary litigation would be to enact legislation that makes the 2012 interim plans drawn by the San Antonio district court the State's permanent redistricting maps.

Sincerely,

Greg Abbott
Attorney General of Texas

cc: Lieutenant Governor David Dewhurst
Speaker Joe Straus
Senator Rodney Ellis
Senator Sylvia Garcia

No. 17-626

IN THE

Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,

Appellants,

v.

SHANNON PEREZ, ET AL.,

Appellees.

On Appeal from the United States District Court
for the Western District of Texas

MOTION TO DISMISS OR AFFIRM OF APPELLEES MEXICAN AMERICAN LEGISLATIVE CAUCUS, ET AL.

David Richards
RICHARDS, RODRIGUEZ & SKEITH, LLP
816 Congress Ave., Ste. 1200
Austin, TX 78701
Counsel for Appellees Shannon Perez, et al.

Anita S. Earls
Allison J. Riggs
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54, Ste. 101
Durham, NC 27707
Counsel for Appellees Texas State Conference of NAACP Branches, et al.

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

Jose Garza
Martin Golando
Michael Moran
LAW OFFICE OF JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 78209
Counsel for Appellee Mexican American Legislative Caucus

Additional Counsel Listed on Inside Cover

Robert Notzon
LAW OFFICE OF ROBERT S. NOTZON
1507 Nueces Street
Austin, TX 78701

Victor L. Goode
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215

Gary L. Bledsoe
POTTER BLEDSOE, LLP
316 West 12th Street
Ste. 307
Austin, TX 78701
Additional Counsel for Appellees Texas State Conference of NAACP Branches, et al.

Joaquin G. Avila
1160 N. 192d Street, Apt. 3-124
Shoreline, WA 98133
Additional Counsel for Appellee Mexican American Legislative Caucus

Luis R. Vera, Jr.
LAW OFFICES OF LUIS ROBERTO VERA, JR.
1325 Riverview Towers
111 Soledad
San Antonio, TX 78205
Counsel for Appellee League of United Latin American Citizens

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because the appeal fails to satisfy the requirements of 28 U.S.C. § 1253.

2. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas violated the Fourteenth Amendment and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, when its legislature intentionally discriminated on the basis of race in drawing eight state legislative districts.

3. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas violated the results standard in Section 2 of the Voting Rights Act with respect to the districts drawn in Nueces County.

RULE 29.6 STATEMENT

The Mexican American Legislative Caucus, Texas House of Representatives (MALC) is an official caucus of the Texas House of Representatives. MALC is also incorporated as a nonprofit, nonpartisan 501(c)(6) corporation titled Mexican American Legislative Policy Council. MALC has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

The League of United Latin American Citizens (LULAC) is a 501(c)(3) organization. LULAC has no parent company and issues no stock.

The Texas State Conference of NAACP Branches is a nongovernmental corporation. It has no parent corporations and no stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
MOTION TO DISMISS OR AFFIRM 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE MOTION 16
I. The Court should dismiss this appeal for lack of jurisdiction 18
II. If the Court concludes it has jurisdiction, it should affirm the district court's decision 22
A. The district court's findings of fact with respect to the legislature's intent are entitled to significant deference 24
B. This Court should affirm the district court's analysis of appellees' intent claims .. 25
C. This Court should reject Texas's attempt to import the preconditions for a Section 2 "results" claim into cases involving intentional racial discrimination 30
D. This Court should affirm the district court's holding that the configuration of HD32 and HD34 violates Section 2's "results" test 33

CONCLUSION 34

APPENDIX

Fact Findings — Plan H283, issued by the U.S. District Court for the Western District of Texas, April 20, 2017 ..... 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Perez,
No. 17A245, 2017 WL 4014810
(U.S. Sept. 12, 2017) 16

Anderson v. City of Bessemer City,
470 U.S. 564 (1985)..... 24, 25

Bartlett v. Strickland,
556 U.S. 1 (2009)..... 31

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981)..... 19, 22

Cooper v. Harris,
137 S. Ct. 1455 (2017)..... 24, 25, 29

Dietz v. Bouldin,
136 S. Ct. 1885 (2016)..... 21

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990)..... 32

Georgia v. Ashcroft,
539 U.S. 461 (2003)..... 10

Goldstein v. Cox,
396 U.S. 471 (1970)..... 22

Gunn v. Univ. Comm. to End the War in Viet Nam,
399 U.S. 383 (1970)..... 18, 19, 20, 21

Hankerson v. North Carolina,
432 U.S. 233 (1977)..... 17

Liberty Mut. Ins. Co. v. Wetzel,
424 U.S. 737 (1976)..... 21

Perry v. Perez,
565 U.S. 388 (2012) (per curiam) 2, 3, 4, 28

Pleasant Grove v. United States,
479 U.S. 462 (1987) 31

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 24

Rogers v. Lodge,
458 U.S. 613 (1982) 24, 31

Shaw v. Reno,
509 U.S. 630 (1993) 14, 17, 30

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 6

Sole v. Wyner,
551 U.S. 74 (2007) 28

Texas v. United States,
887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013) 3, 5, 29

Thornburg v. Gingles,
478 U.S. 30 (1986) ..... *passim*

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 28

White v. Regester,
412 U.S. 755 (1973) 18, 24

Wise v. Lipscomb,
437 U.S. 535 (1978) 18

Constitutional Provisions

U.S. Const. amend. XIV ..... *passim*

Statutes

28 U.S.C. § 1253 ..... *passim*

28 U.S.C. § 1292(a) 19, 21
Voting Rights Act, § 2, 52 U.S.C. § 10301 ..... *passim*
Voting Rights Act, § 3(c), 52 U.S.C. § 10302(c) 6, 27
Voting Rights Act, § 4(b), 52 U.S.C. § 10303(b) 6
Voting Rights Act, § 5, 52 U.S.C. § 10304 ..... 3, 12
2011 Tex. Sess. Law Serv. ch. 1271 (H.B. 150) 1, 4
2013 Tex. Sess. Law Serv. 1st Called Sess. ch. 2 (S.B. 3) 1, 6

Rules

Fed. R. Civ. P. 52(a) 23, 24, 25, 29
Sup. Ct. R. 15.2 2

Other Authorities

U.S. Census Bureau, *Voting Age Population by Citizenship and Race (CVAP)*, https://tinyurl.com/CVAPData (last visited Nov. 27, 2017) 8

Wright, Charles Alan, et al., Federal Practice & Procedure: Jurisdiction and Related Matters (3d ed. 2012) 21

MOTION TO DISMISS OR AFFIRM

Appellees in the above-captioned case respectfully move that the Court dismiss the appeal for lack of jurisdiction under 28 U.S.C. § 1253 or, alternatively, that the Court affirm the district court's order.

OPINIONS BELOW

The appendix to the Jurisdictional Statement omits the district court's opinion issuing findings of fact on Plan H283: *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 1406379 (W.D. Tex. Apr. 20, 2017). That opinion is included in the appendix to this motion (M.D.A. App. 1a-301a).

JURISDICTION

The Jurisdictional Statement invokes this Court's jurisdiction under 28 U.S.C. § 1253 with respect to claims regarding Plan H358 but asserts that claims regarding Plan H283 are "moot." J.S. 5. As explained below, both assertions are incorrect. At present, this Court lacks jurisdiction over claims regarding Plan H358. *See infra* pp. 18-22. And while any challenge to the continued use of Plan H283 would be moot, other claims resting on the district court's analysis of Plan H283 remain live, although they are not yet properly before this Court. *See infra* pp. 27-28 & n.10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to the Jurisdictional Statement omits the statutes appellees challenged. Those are 2011 Tex. Sess. Law Serv. ch. 1271 (H.B. 150), available at http://tinyurl.com/TXPlan283, and 2013

Tex. Sess. Law Serv. 1st Called Sess. ch. 2 (S.B. 3), available at http://tinyurl.com/TXPlan358.

STATEMENT OF THE CASE

This putative appeal involves the legality of eight of the 150 seats in the Texas House of Representatives: HD32 and HD34 in Nueces County; HD54 and HD55 in Bell County; HD103, HD104, and HD105 in Dallas County; and HD90 in Tarrant County. *See* J.S. App. 85a.

The Jurisdictional Statement misstates a central fact about each of these districts. *Cf.* Sup. Ct. R. 15.2. No matter how many times appellants ("Texas" or the "State") claim it "bears repeating" that the district court found intentional discrimination with respect to "*the court's own remedial map*," J.S. 14; *see also id.* 1, 2, 6, 10, 18, 21, 33, 36 (referring to a "court-ordered" remedial plan), that assertion is false. The boundaries of the challenged districts in Plan H358—the apportionment currently in effect—are the product of Texas's own choices, not any court's.

In reality, the State seeks review of the legality of seven districts drawn by its legislature in 2011 and carried forward unchanged into the 2013 legislation that enacted Plan H358, as well as one district drawn by the legislature in 2011 and modified by it in 2013. The district court's incorporation of those districts into an expressly provisional, interim remedy in 2012 does not transform this case into an appeal regarding a court-ordered plan.

1. The 2010 census showed a net increase of four million persons to Texas' population. *Perry v. Perez*, 565 U.S. 388, 390 (2012) (per curiam). That growth was not evenly distributed around the state. *See*

M.D.A. App. 2a. Thus, to comply with one person, one vote, Texas had to redraw the districts from which state representatives are elected. *Perry*, 565 U.S. at 390.

In the four counties relevant here, census figures showed that the minority population accounted for most of the growth. In Nueces County, the growth "was attributable to Hispanics, as both African-American and Anglo population declined." M.D.A. App. 91a. In Bell County, "more than 70% of the growth" was attributable to an increase in the minority population. *Id.* 278a. In Dallas County, the minority population grew by 350,000, while the Anglo population actually "decreased by over 198,000." *Id.* 222a. And in Tarrant County, "almost 89% of the growth was non-Anglo." *Id.* 257a, 266a.

Nonetheless, Republican legislators "were very resistant to creating any new minority opportunity districts because they felt they would be Democratic districts." M.D.A. App. 4a-5a. In fact, Texas actually decreased the number of minority opportunity districts even though that would prevent preclearance under Section 5 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10304. *See Texas v. United States*, 887 F. Supp. 2d 133, 138, 166, 175-76 (D.D.C. 2012) (three-judge court) (finding that Texas, then a covered jurisdiction under Section 5, had eliminated four existing minority opportunity districts and that the three new districts it claimed as "offsets" were "actually existing ability districts" that did not "compensate for the loss"), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). So "despite the massive minority population growth statewide," the legislature enacted a plan that created no increase in

the number of minority opportunity districts. J.S. App. 190a. That plan, enacted into law as 2011 Tex. Sess. Law Serv. ch. 1271 (H.B. 150), was denominated Plan H283.

2. Shortly after the law's enactment, a number of plaintiffs—including appellees here—filed suit in the United States District Court for the Western District of Texas challenging Plan H283. The district court held off adjudicating their claims, awaiting decision from the D.D.C. on the State's preclearance request. J.S. App. 318a. When it became clear that the D.D.C. would not preclear Plan H283 in time for the beginning of the 2012 election cycle, the district court had to "implement[] an interim plan so that the 2012 elections [could] go forward." *Id.* 302a. To meet that obligation, the district court "dr[e]w an 'independent map' following 'neutral principles that advance the interest of the collective public good.'" *Perry*, 565 U.S. at 396 (per curiam). That map was denominated Plan H302.

That independent, court-drawn map no longer has anything to do with this case. Texas immediately challenged Plan H302, and in *Perry*, this Court held that the district court had "erred" in drawing it. 565 U.S. at 392, 396. The Court instead required the district court, on remand, to defer to "the State's policy judgments" and to "take guidance from the State's recently enacted plan"—that is, from Plan H283—"in drafting an interim plan." *Id.* at 393.

The district court had just over a month to respond. Adhering to this Court's directive, it abandoned its independently drawn map and adopted an interim map—Plan H309. J.S. App. 300a. That plan "configure[d] 122 of the 150 districts in [an]

identical manner" to the legislature's Plan H283. *Id.* 303a. In particular, every one of the districts at issue here was identical in Plan H309 and Plan H283. *Id.* 303a n.4.

In leaving many districts untouched, the court took pains to "emphasize the preliminary and temporary nature" of its plan, stressing that "except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters." J.S. App. 303a, 314a. It underscored that its "analysis had been expedited and curtailed" and that its conclusions could "be revised upon full analysis." *See id.* 319a.

But even on the preliminary record, the district court found sufficient evidence of racial discrimination to "substantially" alter twenty-one districts. J.S. App. 313a-14a. A few examples: One district drawn by the legislature "target[ed] low-turnout Latino precincts" to aid an incumbent who "wanted to get more Anglo numbers." *Id.* 307a. Another "dismantle[d]" a diverse, multiracial district, transferring that seat to another county. *Id.* 311a. Still another crafted a "bizarre" set of "'deer antler' protrusions" to "grab predominantly Latino neighborhoods." *Id.* 313a.[1]

---

[1] Six months after the court issued its order on H309, the D.D.C. held that H283 was retrogressive. *Texas*, 887 F. Supp. 2d at 166. Accordingly, that court did not resolve the question whether the plan was also purposefully discriminatory. But it pointed to "record evidence that cause[d] concern" and "strongly suggest[ed] that the retrogressive effect . . . may not have been accidental." *Id.* at 177-78.

3. In 2013, the state legislature replaced the 2012 interim plan. *See* 2013 Tex. Sess. Law Serv. 1st Called Sess. ch. 2. Its new map is Plan H358.

With respect to the "vast majority" of the districts, J.S. 10—including the districts from Nueces, Bell, and Dallas Counties at issue here—the State simply reenacted the boundaries it had initially drawn in 2011 and that the district court had "preliminarily" left in place in 2012, J.S. App. 303a. On its own initiative, the legislature did make changes to one district at issue here: HD90, in Tarrant County. *See* J.S. 13.

4. In response to Plan H358's enactment, a number of the appellees received leave to amend their complaints. *See* J.S. App. 324a-25a. One set of amendments related to appellees' claims against Plan H283: Because this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), released Texas from preclearance, appellees invoked Section 3(c) of the VRA, 52 U.S.C. § 10302(c), seeking to reimpose a preclearance requirement on the State. J.S. App. 324a.[2] A second set of amendments brought challenges to Plan 358 under Section 2 of the VRA and various strands of the Fourteenth Amendment. J.S. App. 325a.

---

[2] In *Shelby County*, this Court struck down the coverage formula in Section 4(b) of the Act, 52 U.S.C. § 10303(b). *See* 133 S. Ct. at 2631. Section 3(c) of the VRA authorizes a court that finds constitutional violations to order that a jurisdiction seek preclearance of any future changes to its voting laws "for such period as [the court] may deem appropriate." 52 U.S.C. § 10302(c).

5. In 2017, after a lengthy multi-part trial, the district court issued a voluminous set of opinions. It upheld many districts that one or another of the appellees had challenged. *See, e.g.*, J.S. App. 11a-12a, 17a-18a, 85a. But it found that in 2011 the legislature had engaged in "intentional" discrimination against minority voters with respect to the challenged districts from Nueces, Bell, and Dallas Counties. *See id.* 275a. And it found that in reenacting those districts in 2013, the legislature intentionally furthered and continued that initial purposeful discrimination. *See id.* 345a-59a.

a. *Nueces County.* "In both 2000 and 2010, Nueces County was majority Hispanic [in total] population and majority HCVAP [Hispanic citizen voting-age population]." M.D.A. App. 91a. Under the plan in effect prior to 2011, the county (whose largest city is Corpus Christi) had two house seats completely within the county and and a share of a third *Id.* 89a-90a. It was "undisputed that Nueces County had two benchmark Latino opportunity districts" under the pre-2011 plan. J.S. App. 126a. Although those districts had previously elected Latino voters' candidates of choice, in the 2008 and 2010 elections, they elected candidates opposed by a majority of Latino voters. *See* M.D.A. App. 90a-91a.

As a result of the 2010 census, the county lost its entitlement to a share of a third seat. M.D.A. App. 91a. A staff member of the Texas Legislative Council wrote to the speaker's chief of staff: "Corpus—Two seats only; three R's. And worse[,] one of the seats will probably have to be more Hispanic than the other and probably elect a D." *Id.* 92a; *see also* J.S. App. 27a.

The district court found that it would in fact have been possible to draw two majority HCVAP districts entirely within Nueces County. *See* J.S. App. 44a (pointing to a plan with districts that were 55.2% and 59.9% HCVAP). But the district court found that the legislature, "[r]ather than exploring whether two HCVAP-majority districts wholly within Nueces County should be drawn," instead "drew one safe district for Hispanics and one safe district for [an Anglo] incumbent." *Id.* 59a. In so doing, map drawers "used a false reliance" on a more favorable data measure than HCVAP. *Id.* 134a.[3]

As configured in Plan 283 and carried over into Plan 358, HD32—the safe Anglo seat—is underpopulated by 563 persons (relative to the ideal district size statewide) and Latinos comprise 46.3% of the citizens of voting age. M.D.A. App. 101a. By contrast, HD34 is overpopulated by 5,512 persons, and Latinos comprise 67.7% of voting-age citizens. *Id.*[4]

---

[3] The legislature sought to avoid the apparent retrogression caused by its elimination of HD33, a benchmark Latino opportunity district in Nueces County, "by creating a new Hispanic opportunity district in a different part of the State." M.D.A. App. 95a. But HD90 in Tarrant County and HD148 in Harris County provided no "offset" since they were "already performing for Latinos." *See id.* And HD90 also violated the Fourteenth Amendment's prohibition on excessively race-based districting. *See infra* pp. 14-16.

[4] CVAP percentages are calculated using five-year rolling American Community Survey data from the Census Bureau. *See* U.S. Census Bureau, *Voting Age Population by Citizenship and Race (CVAP)*, https://tinyurl.com/CVAPData (last visited Nov. 27, 2017). Using 2005-2009 data, HD32 was 44.2% HCVAP, and HD34 was 64.6% HCVAP; using 2008-2012 data, both

The district court pointed to the "jagged boundary line between HD32 and HD34" and the way the legislature used a "boot"-shaped "extension" in HD34 to "remove[] " from HD32 "two potential Hispanic rivals," each "with legislative experience." M.D. App. 99a, 102a. The district court found "evidence that the map drawers (including specifically Representative Hunter) racially gerrymandered the districts that remained in Nueces County to further undermine Latino voting strength." J.S. App. 136a. They "intentionally packed Hispanic voters into HD32 to minimize their number and influence in HD34." *Id.*

The court acknowledged that although plaintiffs had "challenged the Nueces County configuration in Plan H283, this Court did not alter the districts in [its interim 2012] Plan H309." J.A. App. 28a. But it explained that it had "lacked the benefit of the full record in making its preliminary determinations." *Id.* Based on the fully developed record, it found that Plan H283's treatment of Nueces County was the product of racially discriminatory purpose. *Id.* 60a. And because the tainted district lines "remain[ed] unchanged" in the 2013 plan, the district court found that Plan H358 "intentionally furthered and continued" the initial discrimination. *Id.* 60a, 359a.

---

districts' HCVAP percentages had increased, showing that Latinos form an increasing share of Nueces County's residents. *See* M.D.A. App. 101a.

The district court also found that the configuration of HD32 and HD34 violated the "results" test of Section 2 of the VRA. *See* J.S. App. 44a-61a.[5]

As already described, the district court found it was possible to draw two majority-Latino districts, J.S. App. 44a, thus satisfying the first precondition for a "results" claim under the framework established in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The district court also found the second and third requirements to be met by the "high levels of racially polarized voting in Nueces County." *Id.* 48a-49a. And turning to the totality-of-the-circumstances inquiry, the district court emphasized Texas's "long history" of voting-related discrimination, including "intentional vote dilution in the Legislature's enactment of the 2011 plan," *id.* 51a, and the "continuing pattern of disadvantage" suffered by Latinos in Nueces County that hindered their ability to participate effectively in the political process, *id.* 52a-53a.

The district court expressly left open the question of an appropriate remedy. J.S. App. 61a. With respect to the Section 2 "results" violation, it pointed to the potential tradeoff identified by this Court in *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), between fewer but safer districts on the one hand and more, but less safe, districts on the other. J.S. App. 60a. It then advised the plaintiffs to consider whether they would press their claim for a remedy creating a second district if

---

[5] Regardless the intent with which a jurisdiction apportions its seats, an apportionment plan violates Section 2's "results" test "if, based on the totality of circumstances," minority citizens show that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

the two districts had to be drawn entirely within Nueces County (rather than crossing county lines to create districts with a higher percentage of HCVAP). *Id.* 60a-61a.

b. *Bell County.* Killeen, the largest city in Bell County, is majority-minority in population. *See* J.S. App. 179a-81a. The city is home to substantial and growing populations of Latinos, African Americans, and Asian Americans. M.D.A. App. 277a. Under the pre-2011 apportionment, the entire city, save a "minuscule, 200-resident split," was within HD54. J.S. App. 270a.

In 2011, the legislature had needed to add 13,000 persons to HD54 to compensate for the removal of its Burnet County residents (who had been relocated to another district). J.S. App. 270a. "Plans were introduced by minority members [of the legislature] that would have kept [Killeen] more whole, but they were rejected." *Id.* 19a. And so, "instead of adding voters to the existing core of HD54, which already contained almost the entire City of Killeen, mapdrawers removed approximately 33,000 voters from Killeen, 2/3 of whom were minority, and added in Anglo voters." *Id.* 179a. The upshot was the creation of two majority-Anglo CVAP districts (HD54 and HD55), between which Killeen was split. *Id.*

The primary architect of the lines in Bell County was HD54 incumbent Representative Jimmie Don Aycock, an Anglo. *See* M.D.A. App. 277a-78a. Aycock testified before the district court. The court found his explanation of the split "not credible," *id.* 283a, and "unconvincing and pretextual," *see* J.S. App. 19a, "leading the Court to find that the decision to split Killeen and the minority community within it

(removing minorities from HD54 and moving in Anglos) was to ensure that HD54 and HD55 remained Anglo-majority and to make HD54 less likely to perform for minority voters," *id.* The court found that "the 2013 Legislature intended to continue the intentional discrimination found in Plan H283." J.S. App. 22a. Thus, the discriminatory "intent and harm remain in Plan H358." *Id.*

c. *Dallas County.* The results of the 2010 census revealed that although Dallas County's population had increased in absolute terms, it had "lost population relative to the state as a whole." M.D.A. App. 222a. As a result, Dallas County was allocated fourteen house seats instead of its previous sixteen. *Id.* Because all the seats then held by Democrats were minority opportunity districts, "mapdrawers knew that the two lost seats would have to be Republican" in order to satisfy Section 5's nonretrogression test. *Id.*

Although the county's Anglo population actually decreased by nearly 200,000 people while its minority population increased by almost 350,000, the legislature drew no new minority opportunity districts. M.D.A. App. 222a. It rejected a number of proposals that would have created districts without Anglo majorities. *See id.* 237a-40a. Under Plan H283, Anglos controlled nearly 60% of the county's seats with only one-third of the county's population. *See* J.S. App. 166a.

The district court found insufficient proof to conclude that the legislature had acted for racial (rather than partisan) reasons in northeast Dallas County. J.S. App. 169a-70a. But it found that in western Dallas County—where HD103, HD104, and HD105 were located—the district lines were drawn "in

a racially discriminatory manner to intentionally dilute minority voting strength." *Id.* 170a.

Under the previous apportionment, HD103 and HD104 had already been Latino opportunity districts and HD105 was on track to become a majority-minority district. *See* J.S. App. 166a. In 2008, HD105 had come within twenty votes of electing the minority-preferred candidate. *Id.* 167a.

In Plan H283, the legislature responded by crafting a "shored-up" HD105. J.S. App. 171a. It made the new district "more Anglo (and thus more Republican)" than its predecessor. *Id.*

The district court described "an HD103 arm [that] reaches to the west into HD105 (represented by Anglo Republican Harper-Brown), picking up the most heavily concentrated Latino population in Irving and splitting ten precincts. These splits made HD103 [a] lot less Anglo and more Hispanic, and made HD105 more Anglo." M.D.A. App. 228a (citations omitted). HD105 also had a "long arm." *Id.* 229a. While the pre-2011 district was relatively compact, *id.* 230a, the new HD105 "has jagged, bizarrely shaped lines, that extend much farther outward than they used to," *id.* at 231a. The arms were designed "to include Anglos in HD105 and place Hispanics in HD104." *Id.*

The district court heard extensive testimony about the three districts. Ryan Downton, who assisted the legislative leadership in drawing them, *see* M.D.A. App. 1a, "admitted to splitting precincts to put the Hispanic population into HD104 and HD103 and the Anglo population in HD105," J.S. App. 171a. He claimed to have done so in order to comply with the VRA. *See* J.S. App. 171a.

But the district court, which observed his testimony, found Downton "not credible" and rejected that rationalization. J.S. App. 171a-72a. The district court found that "the true motive was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos in HD103 and HD104 while simultaneously making HD105 more Anglo to protect" an Anglo incumbent. *Id.* 172a. And the court found that the "intentional discrimination" with respect to "western Dallas County in Plan H283 still exists in Plan H358." *Id.* 26a. Even though some changes were made to the Dallas County districts in Plan H358, those changes "did not remove or remedy the intentional discrimination." *Id.*

6. The district court also held that HD90 in Tarrant County (where Forth Worth is located) was the product of an unjustified reliance on race in violation of the Fourteenth Amendment under *Shaw v. Reno*, 509 U.S. 630 (1993). *See* J.S. App. 71a-84a.

Unlike the other districts at issue here, HD90 was given its current configuration in 2013, rather than in 2011.[6] J.S. App. 70a. In 2012, the Democratic incumbent, Lon Burnam (who is Anglo), defeated a Latino challenger in the primary by only 159 votes. Burnam received nearly 75% of the Anglo vote but under 30% of the Latino vote. *See* J.S. App. 72a.

---

[6] That said, the district court found that in Plan H283, the legislature had increased the Latino population of HD90 "in bad faith (to claim offset for the loss of HD33[, a Latino opportunity district in Nueces County under the pre-2011 apportionment, *see supra* p. 8 n.3]) and to simultaneously shore up the Anglo population of HD93." J.S. App. 68a.

Burnam, aided by his chief of staff, was the primary architect of the 2013 configuration.[7] *See* J.S. App. 72a. The district court found that their decision to include the primarily African-American Como community was made for political reasons. *Id.* 77a. But it found that other decisions about the district's configuration "were dictated solely by race." *Id.*

The district court pointed out that both drafters "explicitly acknowledg[ed] the use of race." J.S. App. 77a. Burnam, for example, "sp[oke] candidly about there being 'too many white people' in HD90." *Id.* These statements, and others Burnam made on the floor of the legislature, "are as naked a confession as there can be to moving voters into and out of districts purely on the basis of race." *Id.* 80a-81a. The statements "let legislators know they were voting for a racial gerrymander." *Id.* 81a. The district court rejected the claim that the boundary decisions reflected legitimate considerations, given that neither Burnam nor his chief of staff "examined election results while making these changes," "identified other traditional redistricting criteria that would have justified" them, or conducted a real analysis of

---

[7] Texas claims at one point that it "revised HD90 after the Mexican American Legislative Caucus (MALC), a plaintiff in this litigation, insisted that failure to do so would violate VRA § 2." J.S. 4. It provides no support in the record for this assertion. Later, it backs off, instead asserting only that MALC "expressed a specific concern about reducing the district's Spanish-surnamed voter registration below 50%." *Id.* 34 (citing J.S. App. 72a). That citation cannot bear the weight Texas puts on it. It shows nothing more than that MALC was concerned with Burnam's "initial draft map," which *decreased* the district's SSRV.

whether the lines were required by the VRA. *Id.* 77a, 81a-82a.

7. The district court held that the "intentional discrimination" it found in the eight districts "must be remedied." J.S. App. 85a. And it ordered the State to inform it whether the legislature would "take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." *Id.* 86a. Finally, it laid out a schedule for the court to consider remedial plans in the absence of legislative action. *Id.*

8. Instead of responding to the district court, the State sought relief from this Court. On September 12, 2017, this Court granted a stay of the district court's order pending the timely filing and disposition of an appeal. *Abbott v. Perez*, No. 17A245.

REASONS FOR GRANTING THE MOTION

Texas seeks to preempt, rather than appeal from, a district court order granting or denying injunctive relief. Its appeal is thus premature, and this Court lacks jurisdiction to hear it.

But if this Court concludes otherwise, its task is a straightforward one. Texas advances two theories with respect to the districts in Nueces, Bell, and Dallas Counties: First, it argues that evidence of the legislature's intent in 2011, when it enacted Plan H283 and drew the districts at issue here, is irrelevant or otherwise insulated from judicial scrutiny. J.S. 18-21. Second, it argues that a district drawn with racially discriminatory intent cannot violate the Constitution or Section 2 of the VRA unless plaintiffs satisfy the threshold requirements for establishing a Section 2 "results" claim. *Id.* 22-23.

Both arguments are meritless. And once this Court has properly rejected them, there is nothing left to the State's appeal on these districts. Texas offers no reason to reject the district court's detailed factual findings regarding the legislature's discriminatory intent in 2011. Nor does it offer any reason to reject the district court's finding that the State intentionally carried forward that purposeful discrimination when it enacted Plan H358.

As for HD90, the State does not really contest the district court's finding that race was the predominant motive for how the lines were drawn in 2013. It claims only that "even if" that is so, the legislature had a strong basis for considering race "to avoid a VRA §2 violation." J.S. 34. The district court rejected that claim because it found "no evidence that any legislator or staffer" considered the "effect on Latino voting ability in HD90" when drawing the district's boundaries. J.S. App. 81a-82a. Thus, as with the districts in the other three counties, the State simply repeats its version of the facts, completely ignoring the standard of review.[8]

---

[8] While appellee MALC raised both statutory and constitutional challenges to HD90, appellee Texas Latino Redistricting Task Force, which has filed a separate Motion to Dismiss or Affirm, is the sole party that advanced a *Shaw* claim against that district. This Court has long taken the view that a respondent "may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977). There is, of course, as yet no judgment in this case. *See infra* pp. 18-19. That said, MALC takes the position that this Court should affirm the district court's order with respect to HD90 for the reasons given in the Task Force's motion.

If the Court takes jurisdiction, it should therefore affirm the district court's order and remand this case for remedial proceedings.

I. The Court should dismiss this appeal for lack of jurisdiction.

1. This Court's power to hear appeals from three-judge district courts extends only to "order[s] granting or denying, after notice and hearing, an interlocutory or permanent injunction." 28 U.S.C. § 1253. Unless and until the court below grants or denies injunctive relief, this Court lacks jurisdiction to review its decisions. *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 389-91 (1970). As this Court explained in a decision striking down Texas's post-1970 state legislative apportionment as racially discriminatory, the State "could not have directly appealed to this Court the entry of a declaratory judgment" that the plan violated the Constitution "unaccompanied by any injunctive relief." *White v. Regester*, 412 U.S. 755, 760-61 (1973). The Court had jurisdiction only because of "the entry of an injunction." *Id.*

This case is currently in the premature posture described in *White v. Regester* (except it lacks even a declaratory judgment). The three-judge court has ruled that Texas violated federal law with respect to specific districts in Plan H358 when it "purposefully maintained the intentional discrimination" with which the districts had been drawn in 2011 or relied unjustifiably on race. J.S. App. 84a-85a. But the court has not yet granted or denied injunctive relief. Instead, the court has properly "afford[ed] a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure,"

Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (opinion of White, J.). *See* J.S. App. 86a. And it has notified the parties that if the State fails to cure the violations, the court will hold a remedial hearing. *Id.* Thus, at most, the court's order has laid the groundwork for further proceedings that may (or may not) result in injunctive relief. Until such relief is issued—or the court approves a new plan that denies injunctive relief requested by the plaintiffs, and *they* then appeal—this Court is without jurisdiction.

2. The State resists this straightforward conclusion and insists that the order below "constitutes an interlocutory injunction." J.S. 15. The State does not locate this injunction in the text of the order. Nor could it. Instead, the State borrows from case law interpreting 28 U.S.C. § 1292(a) to argue that the order "has the 'practical effect'" of an injunction. J.S. 15-16 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981)). Because the district court found violations that will "*require a remedy*," *id.* 16 (quoting J.S. App. 84a-85a), the State posits, "there can be no serious dispute that the district court's order enjoins Texas from conducting future elections under Plan H358," *id.* 16-17. The State is wrong.

This Court has already squarely rejected the State's construction of Section 1253. In *Gunn*, a three-judge court declared a Texas Penal Code provision unconstitutional. 399 U.S. at 384-86. Rather than enjoin the provision, however, the court opted to give the state legislature an opportunity to cure the defect. *Id.* at 386. On appeal, this Court acknowledged the practical significance of the merits ruling: "[W]hen confronted with such an opinion by a federal court, state officials would no doubt hesitate long before

disregarding it." *Id.* at 390. But it nevertheless held that "because the District Court ha[d] issued neither an injunction, nor an order granting or denying one," this Court had "no power" under Section 1253 to "deal with the merits of this case in any way at all." *Id.* at 390.

Gunn is on all fours with this case, and it requires the Court to dismiss Texas's appeal. As in *Gunn*, while the State has an interest in challenging the district court's holding with respect to its liability, this Court lacks power to hear that challenge unless and until the district court enters an injunction. Recognizing an ultimate right to relief and actually granting that relief fall on opposite sides of the Section 1253 jurisdictional divide.

Moreover, the State errs in conflating the district court's commonplace observation that violations of law generally "require a remedy" with an injunction that commands or prohibits specific behavior. Section 1253 provides for review by this Court only once a three-judge court has made clear precisely "what [it] intends to require and what it means to forbid." *Gunn*, 399 U.S. at 388-91 (citation omitted). At this point, for example, State officials surely would not concede that anything in the order they seek to appeal potentially subjects them to the three-judge court's contempt power. Nor is it clear what districts the court below would require if the State declines to propose a remedial plan that fully cures the violations.[9]

---

[9] The State also highlights that the court ordered the parties, in the event of a hearing, to "come prepared to offer proposed remedial plans." J.S. 16. *That* order cannot constitute

There is a good reason for the requirement identified in *Gunn*: Often, there are many potential ways to remedy a particular violation. Here, for example, the three-judge court found intentional discrimination with respect to districts in Nueces County. *See supra* pp. 7-9. But although that violation requires *a* remedy, the court was careful to explain that there was a tradeoff between possible remedial "configuration[s]." J.S. App. 61a. Given that tradeoff, it is not clear what the court would order if the State does not propose an adequate alternative. Until a remedy is actually ordered, the "practical effect" of the court's liability ruling is unknown and unknowable.

In any event, the "practical effect" doctrine is not meant to permit appeals on questions of liability before the trial court has addressed the issuance or scope of injunctive relief. So, for example, in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), the district court held that the petitioner's pregnancy-related policies violated Title VII. *Id.* at 740-41. The company appealed, despite the fact that the district court had not awarded monetary or injunctive relief,

---

an appealable injunction. It represents nothing more than the court's "authority to manage [its] docket[]" to achieve "the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892-93 (2016). Indeed, the State's theory proves too much: If an order to come to court prepared to discuss remedies were appealable, presumably a state would also be entitled to appeal to this Court if a three-judge court denied a motion to dismiss and ordered it to appear at trial. That is not the law. *Cf.* 16 Charles Alan Wright et al., Federal Practice & Procedure: Jurisdiction and Related Matters § 3922.2 (3d ed. 2012) (orders requiring the parties to prepare plans for injunctive relief ordinarily are not subject to interlocutory review under 28 U.S.C. § 1292(a)).

id. at 742. This Court held that the district court's determination did not permit an appeal pursuant to Section 1292(a). *See* 424 U.S. at 745-46. Nor does the mere possibility of injunctive relief at some future stage supply the "'serious, perhaps irreparable, consequence' that is a prerequisite to appealability" before a final judgment, *Carson*, 450 U.S. at 84 (citation omitted).

Finally, the State's construction of Section 1253 would disrupt the careful balance Congress has struck with respect to appeals from three-judge courts. Jurisdiction under Section 1253 must be narrowly construed in light of Congress's desire to narrow this Court's mandatory appellate docket. *Goldstein v. Cox*, 396 U.S. 471, 478 (1970). And because "piece-meal appellate review is not favored," this narrow construction "must be applied with redoubled vigor" when a party seeks interlocutory review. *Id.*

The State's appeal flouts these longstanding principles. Make no mistake: If this Court reaches the merits and affirms, the State will surely return to this Court with a second appeal if it dislikes any part of the remedy the district court ultimately adopts. For the State, in other words, it is not now or never—it is now and later, again and again, at least until the next round of redistricting in 2021.

Because this appeal fails to satisfy Section 1253's requirements, it should be dismissed.

II. If the Court concludes it has jurisdiction, it should affirm the district court's decision.

Texas's argument on the merits hinges on two propositions, one factual and one legal. Both are wrong.

First, Texas makes a factual assertion: When its legislature adopted Plan H358 in 2013, it "could not possibly have acted with an unlawful purpose," J.S. 18 (capitalization altered), because it did nothing more than "embrace[]" as its own a "remedial plan imposed by the district court itself," *id.* 20. Because that assertion is untrue, the three-judge court was right to consider both the legislature's intent in enacting Plan H283 (the actual genesis of the districts in Nueces, Bell, and Dallas Counties) and its intent in carrying those districts forward unchanged into Plan H358. After laying out voluminous subsidiary findings, the district court found that "the Legislature in 2013 purposefully maintained the intentional discrimination in Plan H283" with respect to the unchanged districts. J.S. App. 84a. Given the standard of review dictated by Fed. R. Civ. P. 52(a), the State's barebones assertion of its bona fides is insufficient to justify overturning the district court's findings, either with respect to these counties or with respect to HD90 in Tarrant County.

Second, the State proffers a legal proposition: The discriminatory intent found by the district court is irrelevant. It claims that plaintiffs cannot prevail on discriminatory intent claims under either the Constitution or Section 2 of the VRA unless they show the level of "vote-dilutive effect," J.S. 22, required to establish liability under Section 2's "results" test. To the contrary, the district court correctly ruled that intentional racial discrimination in how district lines are drawn violates federal law even where a racial minority group cannot prove it is entitled to an additional district in which it constitutes a majority.

A. The district court's findings of fact with respect to the legislature's intent are entitled to significant deference.

Last Term, this Court reiterated its longstanding recognition that a district court's "assessment" of the purposes behind a legislative apportionment plan "warrants significant deference on appeal to this Court." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). This is because the question whether a state's apportionment plan was adopted or maintained for a racially discriminatory purpose is a question of fact to be reviewed under Rule 52(a)'s deferential clear-error standard. *See Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("[A] finding of intentional discrimination is a finding of fact . . . ."); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982) (same). So too is whether racial considerations predominated in a state's redistricting decisions. *Cooper*, 137 S. Ct. at 1465.

In fact-intensive redistricting litigation, a district court's assessment requires "particular familiarity with the indigenous political reality" and "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citation omitted); *accord White v. Regester*, 412 U.S. 755, 769-70 (1973). Even greater deference is required when those findings turn on the credibility of competing witnesses. This Court "give[s] singular deference to a trial court's judgments about the credibility of witnesses . . . because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a

paper record." *Cooper*, 137 S. Ct. at 1474 (quoting *Anderson*, 470 U.S. at 575).

Under Rule 52(a), a reviewing court may not reverse the fact-finder merely because it "would have decided the case differently." *Anderson*, 470 U.S. at 573. And "[w]here there are two permissible views of the evidence, the factfinder's choice between them" must control. *Id.* at 574; *accord Cooper*, 137 S. Ct. at 1465 ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." (citation omitted)). Rule 52(a) thus guarantees that the merits trial remains the "main event" rather than merely a "tryout on the road" to appellate review. *Anderson*, 470 U.S. at 574-75 (citation omitted).

B. This Court should affirm the district court's analysis of appellees' intent claims.

In this case, after conducting two extensive trials at which it heard from a wide range of witnesses—including state legislators, staff involved in drawing district lines, and numerous experts—the district court issued detailed findings of fact regarding intentional racial discrimination in seven state house districts originally drawn by the legislature in 2011 and carried forward unchanged in 2013. The district court also issued detailed findings to support its decision that an eighth district, as drawn in 2013, constituted an impermissible racial gerrymander.

Faced with extensive findings of intentional discrimination, Texas attempts to argue that the district court never should have assessed the facts or made those findings in the first place. None of the State's arguments is convincing. Because the

challenged districts in Plan H358 were originally designed by the legislature in 2011, the district court properly considered the legislature's intent in 2011 as well as in 2013. Its findings regarding the legislature's intent in both periods fully support its conclusion that the challenged districts violate federal law.

1. The State first argues that H358 simply "adopt[ed] the court's own remedial map" and thus could not reflect discriminatory intent on the part of the legislature. J.S. 20-21. That argument fundamentally misstates the facts. *See supra* pp. 4-5.

In reality, the challenged districts in Nueces, Bell, and Dallas Counties were drawn by Texas's legislature and reflect its policy choices. The State concedes that H309 (the district court's 2012 interim plan) "retained without change" the boundaries of those districts as they were configured in H283. J.S. 9. Moreover, it repeatedly emphasizes that Plan H358 left seven of the eight districts at issue in this appeal "unchanged" from Plan H309. *Id.* 2, 27. Thus, by definition, those districts were also "unchanged" from Plan H283, initially drawn by the legislature with no judicial input whatsoever.

Texas therefore has its facts backwards. Rather than the legislature in 2013 "enacting nearly all of *the court's own remedial map*," J.S. 14, the district court in 2012 largely adopted *the State's own legislative map*. And when the legislature passed H358 in 2013, it was, with one relevant exception, simply reenacting *its own* 2011 plan.

2. The State next argues that the district court engaged in the "impermissible issuance and subsequent reliance on an advisory opinion" by assessing the intentional discrimination in Plan H283.

J.S. 22. It matters not at all that the district court issued separate documents detailing its findings with respect to Plan H283's enactment, *see* M.D.A. App. 1a; J.S. App. 88a. The court just as easily could have put all the material related to its findings and conclusions about Plan H283 into its opinion ruling on the legality of Plan H358 under a heading like "The Intentionally Discriminatory Genesis of the Challenged Districts." Because the intent behind Plan H283 is a matter of historical fact relevant to the legality of Plan H358, the district court's discussion of Plan H283 is not an advisory opinion.

The State's mootness argument, *see* J.S. 22, is similarly a red herring. Were appellees seeking an injunction against Plan H283, the State would be correct. But at present, this case does not concern whether the district court can enjoin the use of the challenged districts because they were once in Plan H283; it is about whether those districts, as carried over unchanged into Plan H358, violate federal law. *That* claim is indubitably live.[10]

It was entirely appropriate for the district court, in assessing the live claims against Plan H358, to look to 2011. Plan H358 was "enacted by a substantially similar Legislature with the same leadership only two years after the original enactment." J.S. App. 352a n.37. This Court long ago explained that in "[d]etermining whether invidious discriminatory purpose was a motivating factor," courts can rely on

---

[10] The one live claim against Plan H283 itself involves appellees' request that Texas be subject to Section 3(c) bail-in under 52 U.S.C. § 10302(c). *See* J.S. App. 324a. That claim is nowhere near ripe for this Court's review.

"such circumstantial and direct evidence of intent as may be available," including the "historical background of the decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977). A "series of official actions" can be "particularly" probative. *Id.* at 267.

3. The State next argues that because this Court in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam), directed the district court to implement an interim plan "that complied with the Constitution and the VRA," J.S. 7, any districts that passed unchanged from the legislature's Plan H238 through the court's Plan H309 to the legislature's Plan H358 necessarily satisfy federal law.

Not so. When the district court ordered Plan H309 into effect for the 2012 election, it went out of its way to "emphasize the preliminary and temporary nature" of its order and to disclaim that its decision reflected a "final determination of any legal or factual matters." J.S. App. 303a, 314a. As the district court later explained, its analysis in 2012 "had been expedited and curtailed," *id.* 319a, by "the severe time constraints [under which] it was operating," *id.* 356a. (Indeed, only 39 days elapsed between this Court's January 20, 2012 decision in *Perry* and the district court's issuance of Plan H309. *See id.* 301a.) And the district court "warned repeatedly that its determinations could change after a full trial on the merits." *Id.* 356a n.42. Provisional orders are not determinative. *Cf. Sole v. Wyner*, 551 U.S. 74, 82-86 (2007) (emphasizing the difference between a

determination at the preliminary injunction stage and the ultimate resolution of the merits).[11]

4. Finally, Texas argues that any discriminatory purpose its legislature had in 2011 became irrelevant as soon as it enacted Plan H358 two years later. *See* J.S. 18-21. In the State's version of the story, the legislature enacted Plan H358 because it thought that by enacting that plan, it could bring litigation to an end.

The district court found otherwise. After living with this case for nearly a decade, and after a full trial in which it heard from a wide range of witnesses including legislators, the district court found that the legislature strategically adopted Plan H358 "to insulate [the legislature's] plans from further challenge, regardless of their legal infirmities." J.S. App. 355a. The district court also found that "the racially discriminatory intent and effects" it had "previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged." *Id.* 359a. And the State offers no basis for overturning the district court's finding that the legislature, in 2013, "in fact intended any such taint to be maintained but be safe from remedy" and thus "intentionally furthered and continued the existing discrimination in the plans," *id.* Under Rule 52(a), it is those findings that "must govern" this case. *Cooper*, 137 S. Ct. at 1465.

---

[11] Nor was the court below the only court to warn the state of problems with its districts. *See Texas v. United States*, 887 F. Supp. 2d 133, 177-78 (D.D.C. 2012) (three-judge court), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

With respect to the districts at issue in Nueces, Bell, and Dallas Counties, Plan H358 was simply Plan H283 with a new number slapped on its side. This Court should not allow Texas to seize on interim Plan H309 as a means of laundering districts that were initially of its own unlawful devising.

C. This Court should reject Texas's attempt to import the preconditions for a Section 2 "results" claim into cases involving intentional racial discrimination.

Texas's final argument with respect to the district court's findings of intentional discrimination starts from the premise that even when plaintiffs have proved a legislative apportionment to be the product of purposeful discrimination, they can establish liability only by *also* proving a quite specific form of discriminatory effect: "that additional compact minority opportunity districts could have been drawn." J.S. 22. The State is mistaken. And as a result, much of its district-specific discussion of Nueces, Bell, and Dallas Counties, *see* J.S. 22-33, is irrelevant.

1. Requiring plaintiffs to show the possibility of creating additional majority-minority districts is an artifact of a particular kind of claim: vote dilution under the "results" test of Section 2 of the VRA. As this Court explained in *Gingles*, this requirement is essential when the injury the plaintiffs assert is the state's failure to draw such a district. *See* 478 U.S. at 47-51. By definition, if such a district cannot be drawn, the state's failure to draw it cannot be the basis for liability. *See id.* at 50.

But as this Court has repeatedly recognized, an apportionment adopted for discriminatory reasons

cannot be upheld even if its effect "was, standing alone, perfectly legal." *See Pleasant Grove v. United States*, 479 U.S. 462, 471 n.11 (1987). To the contrary, "[a]n official action" when "taken for the purpose of discriminating against [members of a racial minority group] on account of their race has *no legitimacy at all* under our Constitution." *Id.* (emphasis added) (citation omitted).

The cases following *Shaw v. Reno*, 509 U.S. 630 (1993), are the most recent example of this point. This Court has never required *Shaw* plaintiffs to show that a different district configuration would provide their racial group with additional legislative seats. And even before *Shaw*, this Court declared that legislative apportionments violate the Fourteenth Amendment if "'conceived or operated as purposeful devices to further racial discrimination' by *minimizing*, cancelling out *or* diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617 (emphasis added) (citation omitted).

To be sure, *absent* discriminatory purpose, *Gingles* and this Court's more recent decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), hold that a jurisdiction does not violate federal law simply by not drawing districts that would have increased a small minority group's voting strength. But that says nothing about circumstances like those in the present case, in which the state *does* act with a discriminatory purpose. In *Bartlett*, Justice Kennedy's opinion expressly stated that the *Gingles* precondition of showing that "the minority population in the potential election district is greater than 50 percent" simply "does not apply to cases in which there is intentional discrimination against a racial minority." *Id.* at 19-20

(plurality opinion). Moreover, Justice Kennedy cited with approval *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). In *Garza*, the court rejected the "threshold argument" that districts intentionally drawn to minimize a racial group's voting strength are "lawful, regardless" of that intent, whenever a plaintiff cannot satisfy the *Gingles* precondition. *See* 918 F.2d at 769.

2. The proper rule is that when there has been a showing of intentional discrimination, the plaintiffs must make only "*some* showing of injury" sufficient "to assure that the district court can impose a meaningful remedy." *Garza*, 918 F.2d at 771. That requirement is satisfied in this case. The district court found not only that the legislature deliberately drew districts to minimize Latino influence, *see supra* pp. 7-9, 11-14, but also that Latino voters within those counties were adversely affected by that intentional discrimination. Beyond its denial of a discriminatory purpose, the State offers no argument to rebut that conclusion.

Start with Nueces County. Because much of the Latino population there was deliberately "packed" into one district to buttress the prospects of an Anglo legislator, those Latinos left behind in the overwhelmingly Anglo district were "marginalized." M.D.A. App. 102a. In Bell County, the legislature's decision to split Killeen minimized the voting strength of a multi-minority coalition. J.S. 19a-22a. And in Dallas County, the district court found that the legislature had "unnecessarily plac[ed] Latinos in HD103 and HD104 while simultaneously making HD105 more Anglo to protect the Anglo" incumbent and deny Latinos their fair share of seats within the county. *See id.* 172a.

Given the adverse consequences for those counties' minority citizens, the district court correctly held that appellees have proved a violation of Section 2 and the Fourteenth Amendment. What the remedy should be remains to be determined.

D. This Court should affirm the district court's holding that the configuration of HD32 and HD34 violates Section 2's "results" test.

In addition to holding that the configuration of HD32 and HD34 violated federal law because it was the product of intentional racial discrimination, the district court held that the MALC appellees had "proven a § 2 results violation insofar as two compact HCVAP-majority opportunity districts could be drawn within Nueces County." J.S. App. 85a.[12] This Court need not address that alternative holding if, as appellees have urged, it affirms the district court's findings with regard to appellees' intentional discrimination-based claims. But if the Court does reach that holding, it should affirm.

Contrary to the State's argument, *see* J.S. 29, the district court did *not* conclude that it was impossible to draw two minority opportunity districts within Nueces County. After extensive discussion, that court explained that while two such districts might not offer "the best configuration for minority success," J.S. App. 59a, they would arguably provide an "opportunity to win elections," *see id.* 56a (emphasis omitted). And Texas's claim that the district court "recognized" that a second majority-Latino district in Nueces County would produce an "over-

---

[12] The Perez appellees filed an advisory with the district court joining this claim. *See* ECF No. 1487 (July 12, 2017).

representation" of Latino voters in Nueces County, J.S. 29 (quoting J.S. App. 51a), rests on a misreading of the district court's opinion. Read in context, the district court was pointing out, as part of its totality-of-the-circumstances analysis, that this fact should *not* undermine finding a Section 2 violation, given that even with two majority-Latino districts in Nueces County, Latinos "statewide would still be under-represented." J.S. App. 51a.

Texas has not challenged the district court's findings regarding the demographics of past, present, and potential districts within Nueces County. Nor has it challenged the district court's findings regarding racial polarization and socioeconomic disparities affecting Latino political participation within the county. Given that appellees have satisfied all the *Gingles* preconditions—and in light of the district court's express reservation of the question whether it will require a remedy with two majority-Latino districts entirely within Nueces County, J.S. App. 60a-61a—this Court should affirm the district court's ruling with respect to the Section 2 results claim against HD32 and HD34.

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of jurisdiction or, alternatively, affirm the order of the district court.

Respectfully submitted,

David Richards
RICHARDS, RODRIGUEZ & SKEITH, LLP
816 Congress Avenue
Suite 1200
Austin, TX 78701
Counsel for Appellees Shannon Perez, et al.

Anita S. Earls
Allison J. Riggs
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54
Suite 101
Durham, NC 27707

Robert Notzon
LAW OFFICE OF ROBERT S. NOTZON
1507 Nueces Street
Austin, TX 78701

Victor L. Goode
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215

Gary L. Bledsoe
POTTER BLEDSOE, LLP
316 West 12th Street
Suite 307
Austin, TX 78701
Additional Counsel for Appellees Texas State Conference of NAACP Branches, et al.

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

Jose Garza
Martin Golando
Michael Moran
LAW OFFICE OF JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 78209

Joaquin G. Avila
1160 N. 192d Street
Apt. 3-124
Shoreline, WA 98133
Counsel for Appellee Mexican American Legislative Caucus

Luis R. Vera, Jr.
LAW OFFICES OF LUIS ROBERTO VERA, JR.
1325 Riverview Towers
111 Soledad
San Antonio, TX 78205
Counsel for Appellee League of United Latin American Citizens

November 29, 2017

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	
	§	

FACT FINDINGS – PLAN H283

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

Circuit Judge Smith, dissenting

XAVIER RODRIGUEZ, District Judge and ORLANDO L. GARCIA, District Judge:

General Fact Findings

1. The Texas House of Representatives has 150 members, each elected in a single-member district. Based on the 2010 U.S. Census, the ideal population size for each House district is 167,637.

2. Key players in charge of drawing and putting together the House map were Burt Solomons, Gerardo Interiano, and Ryan Downton, and to a lesser extent Bonnie Bruce, none of whom had any prior experience with redistricting. Tr995 (Downton). The House mapdrawers were drawing under the supervision of House Redistricting Committee ("HRC") Chairman Solomons. *Id.* Speaker Joe Straus and Chairman Solomons were the ultimate decisionmakers on the

number of districts in a county and on pairings. TrJ1575 (Interiano).

3. A regular session starts in January and lasts 140 days, and the only bills that can be passed the first 60 days are emergency items designated by the Governor. Tr1558 (Solomons); TrA1085-86 (Hunter). Committee assignments are often not made until February. Tr1558. Hunter testified that there were emergency items that needed attention. TrA1086. He also testified that the budget was hotly contested and there were fifteen sunset bills. *Id.*

4. Immediately after the census data came out, Interiano and others, including Texas Legislative Council ("TLC") lawyers, Straus's chief of staff Denise Davis, and his legislative director Lisa Kaufman, began looking at county populations to determine drop-in counties and how to abide by the Texas County Line Rule. TrA59-61 (Interiano). Looking at population growth, they determined where new districts would likely go and how many districts would be in drop-in counties. *Id.* Population growth in suburban counties, such as Fort Bend, Williamson, Collin, and Denton Counties, required adding districts in those areas. TrA62, TrJ1535 (Interiano). Dallas County lost two seats, and Tarrant County gained a seat. Bexar County and El Paso maintained the same number of seats. It was not initially decided whether Harris County would maintain 25 districts or would lose a district and have 24. Interiano met with the County delegation leaders to inform them of the likely number of districts they would have. TrA60-61 (Interiano).

5. Interiano started drawing House districts right after the census data came out in February 2011. Interiano 8-2-11 depo. (Joint Ex. J-61) at 157.

6. In drawing the House map, Interiano and Downton relied primarily on non-suspense SSVR with regard to Hispanic districts because (1) non-suspense SSVR data was shown in RedAppl; (2) CVAP data was not available when they started drawing the House map; and (3) they believed, based in part on advice from Hanna (who relied on the 2011 DOJ objection letter), that use of SSVR was appropriate. Tr925, TrJ2070, TrJ2146 (Downton); TrA35, TrJ1534 (Interiano) (SSVR "was the main statistic that we used throughout the entire process"). Downton believed SSVR was a good proxy for HCVAP because a registered voter is presumably a citizen, and he believed that they correlated fairly closely. However, Downton knew that HCVAP was always going to be slightly higher than SSVR. Tr925 (Downton). CVAP data was available no later than April 21, before the map went to the House floor.

7. At the beginning of redistricting, Solomons announced to the members that the House plan would be a member-driven process, by which Solomons allegedly meant that the members would have as much input as possible and the process would be "wide open for that purpose." Tr1560-61, TrJ1069-74 (Solomons). Solomons asked the members to send him three versions of their districts—their ideal/"Christmas list" map, the "realistic map," and one "you can live with but wouldn't necessarily want." Tr922 (Downton); TrJ1934 (Bruce); Tr1563 (Solomons).

8. A main goal for drawers of the House plan was to have a member-driven process that paired the fewest members. Tr1499 (Interiano); Interiano 8-2-11 depo. (Joint Ex. J-61) at 256. By its nature, a member-driven process will protect incumbents. TrJ1382 (Vo); Tr1631-33 (Solomons); TrJ780-81 (Pickett) (redistricting is an exercise in self-preservation). Incumbent protection and re-electing as many Republican members as possible were priorities. Tr1499-1500 (Interiano); Tr997 (Downton); TrJ1729 (Aycock). Solomons wanted to give every incumbent legislator an opportunity to be reelected. Tr922, Tr939 (Downton); Tr1426-27 (Interiano); Tr1560-62, TrJ1069-70 (Solomons). To Solomons, this meant that only members of the same party would be paired when pairing was required. Tr1427 (Interiano). In Plan H283, twelve Republicans and two Democrats are paired. *Id.* Democrats Vo and Hochberg were paired in Harris County. Other pairings in the map paired Anglo Republicans. TrJ1331-32 (Coleman). The mapdrawers felt they were required to pair Republicans achieved the goals of incumbent protection and maximizing Republican seats as much as possible.

9. The process used to draw Plan H283 was not conducive to creating new minority opportunity districts under § 2 of the VRA. Downton testified that they looked at where new districts could be drawn, but balanced that with the Texas Constitution's County Line Rule and the political reality of getting a map passed. Downton 8-12-11 depo. (Joint Ex. J-62) at 20-21; TrJ2036-37 (Downton). It was clear to Solomons that it would take Republican votes to pass a map. Tr1556, Tr1613-14 (Solomons). However, Republicans

were very resistant to creating any new minority opportunity districts because they felt they would be Democratic districts. Thus, Republican members would not vote for a map that created more minority districts or enhanced minority voting strength unless they felt it was legally required. Even Democrats and minority members could be reluctant to create new districts where it would disrupt their districts. TrJ1806 (Lozano). Further, members were often shown only their own districts and approved only their own districts until the first public plan was revealed. Although drop-in county delegation members worked together on the county map, member participation was constricted because all the member can do in that situation is protect his own district. TrJ152 (Arrington). A member cannot create additional minority districts because there is mutual accommodation. *Id.*

10. Solomons assumed that VRA compliance was being looked at by the drop-in county delegations because there were members in protected minority districts in the counties. Tr1603 (Solomons). Interiano testified that delegation maps were dropped into the map "and that was it." TrJ1444. He agreed that, in most cases, they dropped in county delegation maps; if a new Latino opportunity district was created by the delegation, it was left in there, but if there was not a new district, it was not put in. TrJ1445; Interiano 8-2-11 depo. (Joint Ex. J-61) at 47-48 ("[B]eing that this was a – a member-driven process . . . we dropped in a county onto the map, and if it was a [minority opportunity] district that was included in there, it was left in there and if there wasn't, that was it. I mean, I think you'd have to ask the members where – where

those drop-in districts occurred, whether that was done [assessing whether additional Latino or minority opportunity districts were justified] or not."). Interiano did not spend time looking to see what was possible (such as in Harris County and El Paso County) when he knew the delegation was working on a map. Interiano 8-2-11 depo. (Joint Ex. J-61) at 145, 169. Interiano testified that questions about whether the VRA might require something different in a county than what members had agreed upon or might require an additional minority opportunity district were raised to members, and "those were issues that they needed to look at within the delegation." *Id.* at 147-49. Interiano was ultimately responsible for determining whether § 2 required additional districts, but he had to work with the members, and he testified that he "was not in a position to be providing instructions to members." *Id.* at 149, 167-69. His job would include telling Speaker Straus if he thought the law required a particular district. *Id.* at 167.

11. Early in the process, Interiano made an effort to identify the number of Latino opportunity districts in the benchmark so they could meet or surpass that number in the final plan. Tr1443 (Interiano). He testified that whether a district is an opportunity district depends on the HCVAP, SSVR, HVAP, as well as any election analysis that might have been done. Interiano 8-2-11 depo. (Joint Ex. J-61) at 143. However he also testified that he did not know whether HD90 or HD148 were electing Latino candidates of choice. Tr1454. Interiano also testified that he tried to determine how many overall Latino opportunity districts could be drawn. Interiano 8-2-11 depo. (Joint Ex. J-61) at 131, 138. He tried mapping a

Hidalgo+Cameron Latino opportunity district but not others. *Id.* at 140.

12. Interiano also testified that he relied on his conversations with Baker Botts, the OAG, and TLC to determine whether any additional Latino opportunity districts were required, and that he did not think any additional opportunity districts were required, but he did not independently try to draw new opportunity districts. TrJ1531; Interiano 8-2-11 depo. (Joint Ex. J-61) at 48, 169.

13. Solomons relied on staff to tell him which districts were Latino opportunity districts. Tr1584 (Solomons). He did not make those assessments himself. *Id.* Solomons relied on staff, working with TLC, to ensure that the map met legal requirements. Tr1584, Tr1615 (Solomons). Solomons said that if there was an issue raised by staff, who were far more knowledgeable than he was, his role, as facilitator, was to go back and tell the delegations they would have to make some adjustments, and to "get with staff and see what adjustments work out," so they could get a consensus. Tr1606-07.

14. Solomons never told a county delegation or members that they needed to add new Latino opportunity districts. Tr1587 (Solomons). Solomons did not decide whether to draw a new opportunity district in Cameron or Hidalgo. Tr1589 (Solomons). Solomons did not make a decision whether El Paso County needed an additional Latino opportunity district. Tr1601 (Solomons). Solomons agreed it might be possible that the El Paso delegation might agree on the map as satisfactory to them, but that it might not comply with the VRA. Tr1602 (Solomons). He relied on staff to say whether it met the VRA. *Id.* Solomons also

relied on the TLC and OAG to advise him whether there were problems with the map. Tr1640-41 (Solomons).

15. The process also was not conducive to protecting ability to elect under § 5 in existing opportunity districts that were represented by Republicans. Republicans who represented minority opportunity districts but were not the Hispanic candidates of choice, such as John Garza in HD117 and Jose Aliseda in HD35 preferred district configurations that were less likely to perform for Hispanics. Protecting these Republican incumbents required the reduction of Hispanic voters' ability to elect their preferred candidates of choice in future elections. In HD117, this was done by removing areas with higher Hispanic voter turnout and including Hispanic areas with lower turnout, while maintaining the district at exactly 50.1% SSVR. In HD35, all Hispanic population metrics were reduced from the benchmark. Similarly, to protect newly Republican Aaron Peña, mapdrawers created a disproportionately Anglo district, split several precincts on the basis of race, and deliberately underpopulated the district to limit Hispanic ability to elect as much as possible in this majority-Hispanic area.

16. Solomons told members that Interiano and Downton were available as resources for drawing maps. Downton 8-12-11 depo. (Joint Ex. J-62) at 12; Interiano 8-2-11 depo. (Joint Ex. J-61) at 40. Downton had a big-screen TV in his office so members could sit down with him and they could pull up the map and discuss different ideas. Downton 8-12-11 depo. (Joint Ex. J-62) at 12. Interiano also helped answer questions from Solomons, Straus, and others (Harless, Aycock,

Geren) during floor debates. Interiano 8-2-11 depo. (Joint Ex. J-61) at 41-42; Tr1442 (Interiano). However, Solomons preferred that the HRC and staff not be the resource for legal issues; instead he directed members to the TLC for that. TrJ1929 (Bruce). He also refused to allow Interiano and Downton to be legal resources for members of the HRC or the House. D-601 at 131, 146-47; Tr1609 (Solomons).

17. As they started the House map, Interiano and Bruce worked on areas other than the eight drop-in counties, leaving holes where those would go. TrJ1935 (Bruce). Interiano was the primary mapdrawer for the House plan, but Downton also drew parts of the plan. Tr1418, TrJ1575 (Interiano); TrJ1152 (Hanna); TrJ1989 (Downton). Interiano's role in the House map included: rural districts, Bexar County, the initial draft of Pena's district in Plan H113 (drawn with Reps. Peña and Guillen), and helping with amendments in Harris County and the 24/25 district issue. TrJ1575-77 (Interiano). Intern Elizabeth Coburn worked on HD35 with Interiano. For the most part, Interiano had little involvement in drop-in counties other than helping draw the lines in Bexar County and the Harris County amendments made during debate. TrJ1575.

18. Interiano worked on the map as a whole in terms of putting the pieces together, and different members and different delegations worked together on their individual pieces. Interiano 8-2-11 depo. (Joint Ex. J-61) at 159. Interiano made sure to not cut county lines after everybody gave their preferences. *Id.* at 159. The bigger challenge was putting all the pieces together because of all the rural districts. TrJ1573 (Interiano). Rural members could work together with their neighbor, or where there were conflicts they

could go to Interiano, and he would work with them. If there were conflicts, he took them to Solomons or Straus, but if the members agreed, there was no need to elevate the issue to Solomons or Straus unless there was a legal issue raised by legal counsel. TrJ1574 (Interiano). Interiano estimated that he worked with two-thirds of members while drawing the House map. *Id.*

19. Interiano worked with Reps. Peña and Guillen on the initial configuration of Hidalgo County and HD31, and then Downton and Peña made further changes to "maximize" Peña's district. Control of the Hidalgo County map was taken from the other three members, and they voiced strong objections to the map.

20. The incumbents in Fort Bend County worked with Interiano to draw their districts and the new district in that area.

21. The evidence does not indicate who drew the lines in McLennan County (Waco), but Interiano was ultimately responsible for the configuration of the map outside of the drop-in counties.

22. Rep. Jimmie Don Aycock, working with Rep. Sheffield and with assistance from Downton, drew the lines for HD54 and HD55 in Bell and Lampasas Counties. TrJ1755 (Aycock).

23. Drop-in county delegations were instructed to work together on a county delegation plan. The eight drop-in counties were Travis, Denton, Nueces, Tarrant, Dallas, Bexar, El Paso, and Harris Counties. Some county delegations were able to reach an agreement and some were not. If a county delegation

could not agree, Solomons and Speaker Straus would make the final decision. Tr1442 (Interiano).

24. Travis County members were able to reach an agreement, and their delegation map was put into the statewide map unchanged. TrJ2088 (Downton). Rep. Dawnna Dukes only approved of her own district. D-229.

25. Solomons worked on the Denton County drop-in map with other members of that delegation, and Bruce was responsible for providing the delegation map to Downton to put into the entire map. TrJ1924, TrJ1948 (Bruce).

26. Nueces County was drawn by the delegation, primarily by Rep. Todd Hunter, with the agreement of Connie Scott and Raul Torres.

27. The Bexar County delegation worked with Interiano on an agreed map. Rep. Villarreal, the vice-chair of the HRC, was working on draft Bexar County maps and submitting them to Interiano, but Interiano worked separately with Garza and his staff and Larson's staff on the version of HD117 that was ultimately incorporated into the map. Interiano worked on HD117 without input or approval from Rep. Farias, whose district HD118 was also affected. The Bexar County delegation map that went into Plan H113 was not approved by all members of the county delegation. Further, all county delegation members but Garza and Straus voted against the motion to table Farias's floor amendment.

28. The Dallas County delegation could not agree on a map due to the loss of two districts, so Downton drew the map, working with some but not all members of the Dallas County delegation. Tr924-26 (Downton).

Rep. Davis testified that she was shut out of the process. Y. Davis depo. at 198. Other members were also left out of the process or complained that their input was not considered, including Driver (Anglo, Republican), Mallory Caraway (African American, Democrat), and Giddings (African American, Democrat).

29. The El Paso delegation submitted two maps through Rep. Pickett, and Downton moved forward with the map that favored the Republican incumbent Margo even though this was not the map that Pickett preferred. Further, Downton then changed the border between HD77 and HD78 to increase the SSVR of HD78 without consulting any delegation members about the specific changes. Rep. Margo was unhappy with the changes, which he felt did not favor him politically.

30. The Tarrant County delegation submitted a map in which the members approved of their own districts, and that county map was put into Plan H113. Tr929 (Downton); TrJ14 (Veasey). However, Downton made changes to HD90 (Burnam) and HD95 (Veasey) to increase the SSVR of HD90 without consulting the affected representatives. TrJ14 (Veasey). Veasey was not asked for input, even though he was on the HRC. *Id.* Reps. Veasey and Burnam opposed the changes.

31. The Harris County delegation did not submit an agreed map. The thirteen Republican members submitted a map for the whole county that they had worked on without any input from the twelve Democrat members. Downton made some changes "to attempt to comply with the Voting Rights Act" by looking at the SSVR and BVAP numbers and trying to keep the numbers "relatively the same" as the

benchmark plan, and placed that into Plan H113. Tr932 (Downton). After that, Downton made further changes to increase the SSVR of HD148 without approval from Rep. Farrar, who represented the district. *Id.* Additional changes were made during second reading after debate on an amendment proposed by Republican Woolley, and Democrats were allowed to make changes to their districts without affecting the Republican districts or decreasing the SSVR of HD148. Rep. Thompson was able to obtain further negotiated changes with some Democrats and Republicans after that. Tr933 (Downton).

32. Downton was responsible for some of the lines in the House map in Harris County (he made changes to the Republican delegation's map before putting it into the initial public plan and likely increased the SSVR of HD148 after the initial public plan), Dallas County (he was the primary mapdrawer for Dallas County), Hidalgo County (he worked with Peña to make "tweaks" to the district after the first public plan by splitting precincts), Tarrant County (he helped develop the delegation map and then made changes to HD90 and HD95), and El Paso County (he made "tweaks" to the border of HD77 and HD78 by splitting precincts). TrJ1989 (Downton); Downton 8-31-11 depo. (Joint ex. J-62) at 73; TrJ1576 (Interiano). Downton stated that he was "the person who's probably most responsible for all of the tweaks to the districts after the initial draft." Downton 8-31-11 depo.(Joint Ex. J-62) at 73.

33. As they were drafting the House plan, Downton, Interiano, and Bruce did not show legislators full maps, but took maps of individual districts to legislators for them to sign if the district

was acceptable to them. TrJ1539 (Interiano); D-229. Once they got the full map together, they went around with paper copies and asked members (but not all members) to sign off on their districts that they had already talked to them about. TrJ1997 (Downton). Members were asked to sign a map of their district with the statement that the member would vote for passage of H.B. 150 as long as their district was in the form shown in the map. Tr1942 (Bruce); D-229.

34. Although Solomons stated that the process would be member-driven, members had input primarily only on their own districts or counties, and there were numerous instances where the member-driven process was not followed and where member input was not sought or was ignored.

35. At trial, Downton admitted using block-level racial shading in Dallas County, but denied using it in any other part of the House map. TrJ2144-45 (Downton); *see also* Downton 8-31-11 depo. (Joint Ex. J-62) at 113-14 (admitting using block-level racial shading when drawing all six minority districts in Dallas County). However, his denial regarding other portions of the House map is not credible. Downton admitted using block-level racial shading to split precincts along the border between HD77 and HD78 in El Paso County to increase the SSVR of HD78. TrJ2118 (Downton). When discussing racial shading and SSVR in RedAppl in general terms, Downton stated that he "was moving blocks in and out based on the Hispanic shading, if a district needed Hispanic population, [he] would take part of the precinct that was more Hispanic and put it in, and the Anglo part of the precinct in the other district." TrJ2093-94 (Downton). Downton also made changes to HD90 to

increase its SSVR, and the Court finds that he would have used block-level racial shading to do so. HD90 has 27 split precincts, which indicates the use of block-level racial shading. Red-381 Report. The Court finds that Downton would have also used racial shading in the Harris County map to "tweak" the initial map to maintain benchmark minority numbers and to later increase the SSVR of HD148. HD148 has 30 split precincts, which indicates the use of block-level racial shading. Red-381 Report.

36. As he was putting the map together, Interiano continued to work with Hanna, outside counsel, and "the different stakeholders involved." TrJ1612 (Interiano). Interiano, Downton, and Bruce asked Hanna to provide § 5 retrogression analyses on three plans in progress, and Interiano had frequent conversations with Hanna on the phone and in emails. TrJ1612; TrJ1940-41 (Bruce). Hanna's memos were not shared with minority legislators. TrJ1957 (Bruce). Hanna did not provide election analysis; he directed them to the OAG for that. TrJ1613 (Interiano); TrJ2137 (Downton); TrA1513 (Hanna). Interiano sought legal advice from TLC, OAG, and Baker Botts. TrJ1576 (Interiano). Downton sought legal advice from TLC and the Texas OAG, and he also looked at memos from and had conversations with Hanna. TrJ2032-33 (Downton). Downton recognized Jeff Archer of the TLC as an expert on redistricting and respected his opinion, but did not always follow his advice. Tr1007 (Downton).

37. Solomons, Straus, and others wanted to avoid going to the LRB, so there was a lot of pressure to pass the map during the regular session. TrJ1926 (Bruce). Bonnie Bruce, the HRC Committee Clerk, was the

principal driver of the schedule and ensuring that it complied with House rules. TrJ1924 (Bruce).

38. The HRC held a public hearing on redistricting for the Texas House on March 24, 2011, before a map was released, but this hearing did not allow for meaningful public input because no public plan was available at that hearing. TrJ16 (Veasey).

39. Once the first public plan was released on April 13, the process moved very quickly, and all changes were completed on April 28, when the House concluded third reading. The Senate Redistricting Committee did not adopt any amendments to the House map, nor did the full Senate. It is customary for the Senate to not interfere with the House map, and the Senate did not make any changes. Therefore, all meaningful consideration of the House plan occurred between April 13 and April 28. Solomons acknowledged that the session did not end until May 30, but stated that they decided they needed to take the map to the floor and pass the map by the end of April because there were a number of other items that also needed to go to the floor during the session. Tr1628-29.

40. Before the first public plan H113 was released on April 13, the overall plan was largely drawn in secret. No one saw a statewide plan until the first committee plan was released. TrJ1942 (Bruce). Several minority members complained about the secrecy and exclusion from the mapdrawing process. TrJ18, TrJ43 (Veasey); TrJ1298-1305 (Coleman); TrA899 (Dukes).

41. The first public map, Plan H113, was released late in the afternoon on April 13, and the five-day posting rule was suspended to allow the HRC to hold

two public hearings—one on April 15 (fewer than 48 hours later) and one on April 17, which was Palm Sunday (and Solomons was absent). Hanna expressed concern that a Friday hearing did not allow sufficient opportunity for public and member input. After Solomons informed the members from the House floor that he had filed the bill and notified them of the hearings, many members, including Rep. Turner, voiced objections that the time-line was too quick. Tr795-96 (Turner). Fourteen witnesses testified at the April 15 hearing, and all of them opposed Solomons' proposed map. D-116 at 99.

42. Twenty-three witnesses testified at the April 17 hearing, most in opposition to Solomons' proposed map. D-116 at 103. Several witnesses complained about the short notice and the inadequate time to evaluate the map. (*E.g.*, Jacquie Chaumette from Fort Bend County, Donna Klaegez of Burnet County, Chuck Bailey of Dallas County, Gabriel Soliz from Victoria). Witness Rogene Calvert of the Texas American Asian Redistricting Initiative ("TAARI") felt there was insufficient notice for the hearings. Calvert depo. at 69. In addition, Reps. Veasey and Turner testified that there was insufficient time for meaningful public input given the short notice and the hearing being on Palm Sunday. TrJ17 (Veasey); Tr798 (Turner).

43. The HRC formal meeting to consider amendments (with no public testimony allowed) was set for 11 a.m. April 19 in the Agriculture Museum, without cameras or a method to allow recording. Alvarado decl. (docket no. 331) at 6. The latest version of Solomons' statewide plan (Plan H134) was made public the day before on April 18. The HRC voted out

the plan on the 19th with few changes. Tr799 (Turner). Solomons went back to the floor again that week and indicated that for all other members who were not on the HRC, they would be given until that following Friday to file amendments on the bill that was voted out the 19th. Tr799 (Turner). After concerns were raised, the deadline for filing amendments was changed to Monday, and the bill would go to the floor on the 27th. Tr800-01 (Turner); TrJ1259 (Thompson). Turner again said the time-line was not adequate and complained to Solomons about the lack of input from the black caucus. Tr801.

44. Although members were given more time to file amendments, that did not translate into more minority input into the map. Minorities presented options that would have expanded the number of minority opportunity districts, and they were routinely defeated in committee and then later on the floor. TrJ155-56 (Arrington).

45. Minority legislators testified that there was inadequate time for people to respond to the proposed plan. Y. Davis depo. at 203; TrJ1259 (Thompson). When Turner questioned the schedule, he was told they were operating on an expedited schedule, even though there were still five or six weeks left in the session. Tr798 (Turner). This was Turner's third redistricting process and he said that "this was a much more expedited timeline" compared to the previous two, and "it didn't provide us with enough opportunity to get the word out, to have people come up to testify on maps, on a substantive map, that was just introduced on April the 13th." Tr796. He stated that in the past they would have had a week and a half at least. Tr796.

46. Minority groups testified and said that the VRA required changes to the proposed map, but those changes were not adopted. TrJ18 (Veasey). Minority members also offered amendments and alternative plans, but they were not adopted by the HRC. *Id.* Minority House members were very upset about the secrecy and lack of inclusion in the process. *Id.* Veasey does not believe the process was fair and inclusive of minority-elected officials because of the secrecy, last-minute changes, and lack of input. TrJ19.

47. Rep. Alvarado, a member of the HRC, testified that the committee met with little notice to the public and had accelerated timetables for consideration of committee amendments and committee substitutes. Alvarado decl. (docket no. 331) at 6. There were only four days between initial consideration of committee substitute Plan H113 by the HRC on April 15 to passage from the HRC on April 19. The accelerated time-line made it difficult for the public and members to meaningfully amend the bill or give full comment. Alvarado decl. (docket no. 331) at 6.

48. Hanna did not feel this redistricting cycle was under more time pressure than the past two cycles. TrJ1177 (Hanna). Hunter testified that the redistricting procedures this time were not substantially different from others he has experienced. TrA1088.

49. There were few improvements that would benefit minorities between Plan H113 and H283. Joint Expert Ex. E-2 (Kousser Report) at 71; Tr806 (Turner). Although the non-suspense SSVR was increased above 50% in HD90 and HD148, the representatives of these districts and minority legislators opposed these changes as unnecessary given that these were already

performing minority districts. These increases in SSVR were not made to enhance minority voting opportunity or ability, but to "offset" the loss of HD33 as a majority-Hispanic district and increase the number of SSVR-majority districts in the map. Tr238 (Kousser). In the second and third reading, although some minority members' minor amendments passed, no amendments passed that would have repaired minority districts or increased minority voting strength statewide. TrJ46 (Veasey); Tr806 (Turner).

50. Rep. Turner testified this redistricting cycle was less transparent than the previous two and had much more of an adverse effect on minorities. Tr805. He felt that the House map was predetermined and public input did not cause any changes. Tr806.

51. Rep. Farrar testified that it was not an open process and it seemed that many things were already decided by leadership early in the process. Farrar depo. at 90-91.

52. Rep. Y. Davis did not think the process was fair. Y. Davis depo. at 30. She did not believe it was an open process because they did not see the map until it was put on the floor. *Id.* She was not shown her district before the first public plan was released. *Id.* at 202.

53. Not all minority members were displeased with the process, however. Rep. Anchia did not have any complaints or criticisms of the 2011 redistricting process other than that his district was overpopulated. Anchia depo. at 165. Anchia testified that Downton's door was generally open. *Id.* at 174. Rep. Lozano (at the time a Democrat, now a Republican) felt that House leadership was there for him during redistricting. TrJ1791 (Lozano).

54. Mapdrawers applied the County Line Rule to the census data to determine how many districts would be placed within each county and whether the County Line Rule would have to be broken to comply with one-person, one-vote. Hanna had advised the HRC that the County Line Rule would have to yield to the VRA. D-590 at 38-39; D-124. Solomons took the position that they would not break the County Line Rule unless it was necessary to comply with one-person, one-vote, and he relied on staff to determine when that was necessary. Solomons refused to break the County Line Rule to comply with the VRA, stating he would need a federal court to tell him that the VRA trumped the County Line Rule. Solomons flatly rejected all plans that broke the County Line Rule in order to create or maintain minority opportunity districts.

55. Mapdrawers also took the position that any excess population in a county (what they termed "spillover") had to be placed in only one other district, and could not be divided and placed in two districts. TrJ2043-44 (Downton). Hanna had provided testimony before the committee that there was no clear answer on that issue, D-590 at 51-57, and numerous past maps had placed spillover into more than one district.

56. Interiano testified that Plan H283 has one county cut in violation of the County Line Rule in Henderson County; part of its population is joined with Ellis County to create HD10. Tr1423 (Interiano). He testified that all other county cuts are spillovers, which were not considered to be county cuts in violation of the County Line Rule. Tr1426 (Interiano).

Arrington also testified that Plan H283 had one County Line Rule violation. TrJ181.

57. For § 5 compliance, mapdrawers compared the number of Hispanic-majority districts (using SSVR) and African-American districts (using BVAP) in the plan with the benchmark. They felt that as long as the they had the same number of minority districts statewide as in the benchmark, they were not retrogressing. Downton 8-12-11 depo. (Joint Ex. J-62) at 19. Benchmark HD33 would have been included in the count of benchmark majority Hispanic districts. *Id.* at 20.

58. Downton testified that if a district was majority-minority CVAP, then by definition the majority group had the opportunity to elect their candidate of choice, and any failure to do so was a function of turnout and not of whether they had the opportunity. Downton 8-12-11 depo. (Joint Ex. J-62) at 24-25. He felt it was an opportunity district even if the district was never electing the minority candidate of choice. *Id.* at 25. He stated that, if a district performed consistently for minorities but was not majority-minority, it was not considered to be a protected district, but that fact would be considered from a political perspective. *Id.*

59. Downton testified that, for the House map, they also looked at total Hispanic population, HVAP, and Black total population to make sure they did not retrogress districts. Downton 8-12-11 depo. (Joint Ex. J-62) at 22. He said that they looked at the OAG retrogression analysis for minority-majority districts to ensure they had a legal map by maintaining benchmark levels. *Id.* at 22-23. He stated that if a district was a majority-minority district, they would

look at the election analysis under the benchmark plan and under the new plan to see if they matched up, and they would try to maintain the election performance under the OAG 10 as close to benchmark as possible. *Id.* at 23-26. Interiano also testified that they tried to keep population metrics and minority performance in majority-minority districts near benchmark levels. TrA35. However, they did not try to maintain minority performance levels in HD35, HD41, or HD117, minority opportunity districts with Republican incumbents, because doing so would make it harder for the Republican incumbents to win re-election.

60. Interiano had discussed with Hanna how to measure retrogression, and had talked about the DOJ letter from 2001, which said that an election analysis should be conducted as part of the retrogression analysis. TrJ1538 (Interiano). Interiano testified that he did not look at election performance of benchmark districts until close to end of the process, around the time that Plan H153 was voted out of committee. TrA10. Although he knew from the OAG analysis that performance in HD35, HD41, and HD117 had decreased, no changes were made to any of those districts in response. TrA11 (Interiano). Interiano felt that any decreases in performance could be offset by increases in performance elsewhere in the map. TrA34, TrA37, TrA77 (Interiano). Interiano used the OAG analysis for § 5 compliance and felt that if one minority district went from 3/10 to 5/10 wins and another from 5/10 to 3/10 wins, then it was a wash. TrA34 (Interiano). Interiano testified that they did not remedy all of Hanna's concerns because they had worked with members and the rest of the legal team (Baker Botts and the OAG) and had been assured the

plan was legal, and they thought there were offsets throughout the map. TrJ1529-20, TrJ1538 (Interiano).

61. Interiano and Opiela were friends and had frequent personal and email contact throughout the House redistricting process. TrJ1478 (Interiano). Downton and Opiela were also friends. TrJ2085 (Downton). Although mapdrawers denied that Opiela had any input into the House map, this testimony is not credible. Interiano emailed Opiela on March 3 asking for help on something he was working on, and this was a time Interiano testified he was not working on a congressional plan. US-104. Interiano also emailed Opiela information about House plans, and they discussed proposed House plans. US-514; US-515; US-493; TrJ2086 (Downton). Even if Opiela did not directly play a role in drawing district lines in the House map, he shared his ideas with Interiano and Downton, and there is evidence that the mapdrawers utilized a variation of Opiela's nudge factor and manipulated Hispanic voter turnout in drawing districts.

62. Interiano denied using Hispanic turnout data to draw districts and denied getting turnout data from Opiela or another source. However, this testimony is not credible. Interiano admitted that members wanted to look at turnout. In addition, reports from the Texas OAG that Interiano received and relied upon included estimated turnout by race in specific districts. *See* US-3; D-182; D-183. Downton also knew that whether a majority-minority district performs is partly a question of turnout. Downton 8-12-11 depo. (Joint Ex. J-62) at 24-25; TrJ133 (Arrington). Interiano and Downton were aware that the effectiveness of a minority district depended in large part on voter

turnout and that manipulating Hispanic voter turnout would help protect Republican incumbents in minority districts.

63. Interiano testified that he did not know how to do racial shading at the block level while he was mapping. TrA72-73. This testimony is not credible, given the fact that he claimed 1000 hours of experience with RedAppl, that Downton knew how to use block-level racial shading, and that "block" is clearly visible as an option on the drop-down menu when a RedAppl user selects shading level. Bruce testified that she would be surprised to hear that Interiano was unaware that RedAppl has the capability to shade census blocks by race. TrJ1967.

64. The benchmark plan H100 had 29 SSVR-majority districts (using non-suspense SSVR), including: 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 79, 80, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, and 145.

65. Plan H113, the first publicly released plan, had 28 SSVR-majority districts (using non-suspense SSVR): these were the same districts that were in Plan H100 except for HD33. (HD104, which had been majority SSVR using either non-suspense or total SSVR, was now 50.1% non-suspense SSVR and 48.1% total SSVR).

66. Downton noted that there was testimony at the HRC hearings that they reduced the number of Hispanic-majority districts by one, and that there were three districts in which they could increase the SSVR over 50% to raise the number. TrJ2099 (Downton). The mapdrawers chose to increase the SSVR in HD90 and HD148 because those districts

were performing minority districts with Democrat incumbents. They chose not to increase the SSVR of HD78 because it had a Republican incumbent, increasing the SSVR might endanger his re-election, and they felt they did not need to increase the SSVR of all three districts above 50%. Solomons was aware that people were saying that the increase in SSVR in HD90 and HD148 was not necessary to comply with the VRA because they were already performing Latino districts. Tr1600 (Solomons). Interiano testified that they did not look at any election analysis to determine whether HD90 or HD148 were opportunity districts in the benchmark plan. Interiano 8-2-11 depo. (Joint Ex. J-61) at 152-53. They counted them as new Latino opportunity districts in the enacted plan simply because they were majority-SSVR in the enacted plan but not in the benchmark. *Id.* at 152-53.

67. Plan H153, the plan passed out of the HRC on April 19, had 30 SSVR-majority districts (using non-suspense). They were the same districts as in H113 but HD90 and HD148 were added, with HD90 brought to 50.1% non-suspense SSVR (but only 47.9% total) and HD148 brought to 50.2% non-suspense SSVR (but only 49% total). The total deviation of Plan H153 was 9.9%, with the smallest district being HD90 (-4.9%) and the largest being HD103 (+5%).

68. Plan H283 has the same 30 majority-SSVR districts (using non-suspense SSVR). The smallest district is HD90 (-4.9%) and the largest district is HD61 (+5.02%), for a total deviation of 9.92%.

69. Plan H100 had 30 HCVAP-majority districts based on 2005-2009 ACS data: 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 78, 79, 80, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145. HD51

was 45.8%; HD90 was 47.9%; HD103 was 46.5%; HD148 was 42.1%.

70. Plan H113 had 29 HCVAP-majority districts, the same ones as in H100 except for HD33 in Nueces County. HD32 was 42%; HD51 was 44.1%; HD90 was 43.2%; HD103 was 44.5%; HD148 was 42.4%.

71. Plan H153 had 30 HCVAP-majority districts, adding HD148. HD32 was 43.6%; HD51 was 44.1%; HD90 was 49.7% (50% is within the margin of error of +/- 2%); HD103 was 44.6%.

72. Plan H283 has 30 HCVAP-majority districts (31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 78, 79, 80, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145, and 148) using 2005-2009 ACS data. HD32 is 44.2%; HD51 is 44%; HD90 is 49.7(+/-2)%; HD103 is 44.6%.

73. Dr. Chapa estimated that Plan H283 has 31 HCVAP-majority districts (the same 30 as determined by using 2005-2009 ACS data, plus HD90 with estimated 52% HCVAP), 10 BCVAP-majority districts, and 9 B+HCVAP-majority districts, for a total of 50 minority-majority-CVAP districts. Joint Expert Ex. E-1 (Chapa Report) at Table 11.

74. The House plan splits 412 precincts, and some precincts are split more than once. TrJ138 (Arrington); US-387 (Red-381 report). In the House map, precincts are split most often in the minority districts. TrJ139 (Arrington). Looking at the whole state, Dr. Arrington found that there was at least one precinct split in 85% of minority districts compared to 56% of Anglo districts, and about three times as many splits per precinct in the minority districts than in Anglo districts. TrJ139 (Arrington). Looking only at urban

counties, he found that 87% of the Anglo districts have at least one split while 84% of the minority districts have at least one split, but there are twice as many splits per district in the minority districts than in Anglo districts, and the difference is statistically significant at the .002 level. TrJ140, TrJ218 (Arrington); US-519 (the mean number of splits in minority districts is 10.57 and in Anglo districts is 5.32). He concluded that the disruption from splitting precincts would be primarily in minority districts. TrJ140 (Arrington). Kousser found that 252 (61%) of the split precincts had BHVAP populations above 50% while only 3154 (37.5%) of the state's precincts had such concentrations of Latinos and African Americans. Joint Expert Ex. E-2 (Kousser Report) at 84.

75. Dr. Arrington acknowledged that there can be race-neutral reasons for splitting precincts (such as equalizing population), but he did not distinguish between race-conscious and race-neutral reasons for precinct splits in his analysis. TrJ141. However, he felt it was inconceivable that all of these other, race-neutral reasons would center on the minority districts to that extent and not in Anglo districts. TrJ1410, TrJ218 (Arrington). Arrington testified that race was being used improperly to split precincts to increase Anglo population percentages in HD41 to make it more Republican and to reduce the ability of Hispanics to elect a candidate of their choice. TrJ141-44. He also noted that precincts were split based on race in HDs 103, 104, and 105 in Dallas County. US-519.

76. Downton stated that he split precincts based on member requests, or in making changes to comply with the VRA, alter SSVR levels, "that type of thing." TrJ2023.

77. Solomons opposed Farias's proposed amendment to Bexar County in the House map in part because it increased the number of split precincts. TrJ333-35 (Farias). Given the number of split precincts in the plan, this basis for opposition was pretextual.

78. Minority members and groups thought Plan H283 would have a negative impact on the minority community because it did not account for the minority growth. Y. Davis depo. at 203. The Legislature was told that this map would not be good for minorities. *Id.* at 204.

79. Dr. Arrington opined that there is discriminatory effect (retrogression) because the benchmark plan had 50 effective minority districts, and H283 has only 45 or 46. TrJ118 (Arrington). He noted that HD33 in Nueces County was eliminated/moved and HD149 in Harris County was eliminated/moved; he concluded that HD117 in Bexar County was no longer effective and HD35 was no longer effective; and he was not sure about HD41's performance due to the many split precincts (and therefore unreliable election data); and no new minority opportunity districts were created. TrJ119-20 (Arrington). Dr. Arrington looked at demographics and election results (endogenous and exogenous). TrJ121. For endogenous elections, he relied on data from the State regarding elections and Hispanic candidate of choice. TrJ122-23. For exogenous elections, he and Dr. Handley looked at one election in each of the five elections in the previous decade, and looked at the highest office for which there was a Hispanic candidate who was preferred by Hispanic voters. TrJ123.

80. Dr. Engstrom concluded that Plan H283 provided Latinos with a reasonable opportunity in 30 districts: 31, 34, 36, 37, 38, 39, 40, 41, 42, 43, 51, 74, 75, 76, 77, 79, 80, 90, 103, 104, 116, 118, 119, 123, 124, 125, 140, 143, 145, and 148. Joint Expert Ex. E-7 (Engstrom Corr. Rebuttal Report docket 307-1) at 28. Dr. Engstrom considered Latinos to have a reasonable opportunity in a district when their preferred candidates win a majority of the votes cast in the district in a select set of general and primary elections more often than not. *Id.*; Tr511-12 (Engstrom). Dr. Engstrom concluded that the Latino Task Force Plan, H292, provided Latinos with 34 such opportunities: 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 74, 75, 76, 77, 78, 79, 90, 103, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145, and 148. Joint Expert Ex. E-7 (Engstrom Corr. Rebuttal Report) at 28-29.

81. Dr. Chapa testified that there is sufficient concentrated minority population to form more majority-minority districts (with combined Latino and African-American CVAP population) than were created in Plan H283. Tr189.

82. Dr. Kousser opined that every other plan he looked at that was considered during the session (H111, H115, H130, H195/H269, H201, and H205) offered more opportunities for minorities to elect their candidates of choice in terms of the numbers of HVAP, HCVAP, B+HVAP, and B+HCVAP-majority districts created than Plan H283 did. Joint Expert Ex. E-2 (Kousser Report) at 80, Table 19. He concluded that the failure to create more opportunity districts was not justified by the number of deviations, county breaks, split VTDs, and compactness scores of other plans. *Id.* at 81-86; Tr240-45. Plan H283 has a larger average

deviation than several other plans, is less compact than almost all the other plans, and it splits more VTDs. Tr244 (Kousser). To address criticisms that the proposed districts in minority proposed plans are not compact, Kousser looked at compactness of districts in Plan H283 and concluded that the minority districts in Plan H283 are not more compact. Tr244-45. Mapdrawers rejected these plans as violating the County Line Rule or failing to create more HCVAP or SSVR-majority districts than their plan.

83. Kousser and expert Anthony Fairfax opined that Plan H283 provided less opportunity than the benchmark plan because it reduced the number of B+HVAP districts, despite the minority population growth. Joint Expert Ex. E-2 (Kousser Report) at 80; Tr844 (Fairfax).

84. Plan H201 (MALC's Whole County Plan submitted during the session) has 32 SSVR-majority districts, 31 HCVAP-majority districts, 37 HVAP-majority districts, 50 B+HCVAP-majority districts, and 59 BHVAP-majority districts. Joint Expert Ex. E-2 (Kousser Report) Table 19; Tr91. According to Dr. Chapa's 2010 population estimates (Report Table 9), Plan H201 has 32 HCVAP-majority districts, 11 BCVAP-majority districts, and 55 H+BCVAP-majority districts. Tr186, 188 (Chapa). Interiano testified that H201 has three county cuts. TrJ1434-35.

85. Plan H205 submitted during the session has 34 HCVAP-majority districts, 42-HVAP-majority districts, 53 H+BCVAP-majority districts, and 62 BHVAP-majority districts. Joint Expert Ex. E-2 (Kousser Report) Table 19. According to Dr. Chapa's 2010 population estimates (Report Table 10), Plan H205 has 34 HCVAP-majority districts, 9 BCVAP-

majority districts, and 58 H+BCVAP-majority districts. Tr188 (Chapa). Interiano testified that this map has numerous county cuts. Tr1436-37 (Interiano).

86. Professor Lichtman opined that Plan H232 (submitted during the session) created eight additional effective minority opportunity districts (three in Dallas County, three in Harris County, one in Tarrant County, and one in Fort Bend County) compared to the enacted House plan. Tr1229-30, Tr1239-34 (Lichtman); Joint Expert Ex. E-3 (Lichtman Report) at 9-14. Two of the districts are majority-HVAP and the others are majority-minority-VAP. In Dallas County there are two net additional majority-minority districts: HD101 with 54.2% combined minority and HD102 with 75.5% combined minority. There is also HD105 with 60% HVAP and 72.3% combined minority VAP. Tr1230 (Lichtman). In Harris County, there are HD132 (67.3% combined minority VAP), HD149 (84% combined), and a majority-HVAP district HD138 (57.3% HVAP and 71.2% combined VAP). In Tarrant County, there is HD96 (51% combined) and in Fort Bend County HD28 (70.6% combined VAP). *Id.* Each of the proposed new districts performs for minorities in the five 2008 and 2010 general elections Lichtman studied. Plan H232 has only one County Line Rule violation, the same number as Plan H283. Tr1437 (Interiano). It has two fewer HCVAP-majority districts (28) than Plan H283. Tr1439-40 (Interiano).

87. Expert Anthony Fairfax opined that, using 2010 Census data, Plan H202 (the Legislative Black Caucus map submitted during the session, which had 24 seats in Harris County) had 65 majority-minority-VAP districts. Joint Expert Ex. E-13 (Fairfax Report

(docket 267-2)) at 8. There are 12 districts that are predominantly African American, 45 that are predominantly Hispanic, and 93 that are predominantly White. The relative overall deviation range was 9.93% and the relative mean deviation was 2.97%. The plan has 151 split VTDs. *Id.* at 9. In Fairfax's supplemental report (docket 267-1), which used TLC CVAP data from RedAppl, he found that Plan H202 has 56 majority-minority-CVAP districts (in which non-Hispanic White CVAP was less than 50%), 53 of which were majority Hispanic plus Black (H+BCVAP>50%), 14 were predominantly Black, and 33 were predominantly Hispanic (31 were majority-HCVAP). The remaining 103 districts were predominantly White. Supp. Report at 4. Fairfax states that Plan H202 displayed overall mean compactness values that are closer to the ideal value of 1 for all three compactness measurements used (Reock, Schwartzberg, Polsby-Popper) than Plan H283. Supp. Report at 5. The least compact district was more compact than the least compact district in H283 using Schwartzberg and Polsby-Popper, while the compactness measurements for the least compact district was the same using Reock. According to Fairfax (Supp. Report at 6), this plan increased the number of H+BCVAP majority districts from 57 (benchmark) to 58. Interiano testified that Plan H202 maintained the Henderson County split, and also split San Patricio, Nueces, Victoria, Goliad, Bee, and Austin Counties. Tr1435-36.

88. Fairfax also opined that Plan H214 had 63 majority-minority VAP districts. Joint Expert Ex. E-13 (Fairfax Report (docket 267-2)) at 9. Twelve districts were predominantly African American, 42

were predominantly Hispanic, and 96 were predominantly White. Twenty-nine are majority-HCVAP. Using CVAP data from RedAppl, this plan had 54 majority-minority districts (in which non-Hispanic White CVAP was less than 50%); 51 of these were majority Hispanic plus Black (H+BCVAP>50%), 14 were predominantly Black, and 31 were predominantly Hispanic. The remaining 105 districts were predominantly White. Fairfax states that Plan H214 displayed overall mean compactness values that are closer to the ideal value of 1 for all three compactness measurements used (Reock, Schwartzberg, Polsby-Popper). Supp. Report (docket no. 267-1) at 5. The least compact district was more compact than the least compact district in Plan H283 under all three compactness measurements.

89. The Task Force's Plan H292 has 31 HCVAP-majority districts: 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 78, 79, 80, 90, 103, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145, and 148. The Task Force contends that HD51 (HCVAP 43.7%, SSVR 36.9%), HD90 (49.7% HCVAP, SSVR 50.1%), and HD103 (HCVAP 44.6%, SSVR 38.1%) are also Latino opportunity districts. The Task Force does not count HD80 as a Latino opportunity district despite its HCVAP-majority status because minority-preferred candidates do not win more often than not in the general election (3/7 or 6/13). The Task Force therefore asserts that H292 has 34 Latino opportunity districts. Interiano testified that it has six county cuts—Nueces, San Patricio, Victoria, Brazos, Henderson, and Smith Counties and would violate the Texas Constitution. Tr1440.

90. The mapdrawers, the HRC, and the Legislature were aware of one person, one vote requirements for the House map, and were also aware of the decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (2004). Interiano 8-26-11 depo. (Joint Ex. J-61) at 11-12. At the March 1, 2011 HRC hearing, Hanna stated that for the Texas House districts the law "allows for a ten percent deviation without justification . . . ." D-590 at 40. But he noted that the case of *Larios v. Cox* might mean that "the old ten percent rule, which was a safe harbor, may not be any more." *Id.* Hanna warned that "[i]f all [of a] certain kind of district are drawing small, then we start to run into the sort of issues that they [had] in [*Larios v.*] *Cox*. Or if all the districts are drawing big, we start to run into that question. That's not fully developed jurisprudence yet but that starts to get me a little bit concerned." D-590 at 45. Hanna advised that, to avoid *Larios* problems, the Legislature should "[e]nsure that all deviations are justified by a legitimate, consistently applied policy such as the preservation of county lines" and should "[m]ake sure that deviations in a plan with a total deviation of less than 10 percent do not consistently advantage or disadvantage one or more regions, racial or ethnic groups, or political parties." Perez-132 at 1. At the April 15 HRC meeting, Rep. Madden and Luis Figueroa of MALDEF discussed *Larios*, and Rep. Madden noted that the case "indicated that you had to pay attention to deviations from the standard so that you didn't have one group as under and other groups as over." D-595 at 57.

91. The TLC's publication, *State and Federal Law Governing Redistricting in Texas* (March 2011 version), stated, "[I]t is reasonably clear that, so long

as the total deviation range of a state legislative plan remains under 10 percent, the state is not required to strive for a more exacting level of population equality. Within this range, the state is relatively free to use population deviation for any rational purpose. However, as discussed in Section D below, a discriminatory scheme of population deviation may be invalid for other reasons, even if the range of deviation is less than 10 percent." US-357 at 36. Section D stated, "Even if a legislative plan has an overall range of population deviation less than 10 percent, a pattern of population deviation within that range to further invidious intentional discrimination or that inadvertently resulted in systematic underrepresentation of a racial or ethnic group may be held invalid on other grounds." *Id.* at 37. It also warned that, "To minimize the chance of a successful challenge under the somewhat amorphous *Larios* standard, mapdrawers may want to consider, in a legislative redistricting plan with an overall deviation of less than 10 percent, avoiding deviations that consistently advantage or disadvantage a particular political, racial, or ethnic group or region of the state." *Id.* at 39.

92. Plan H283 has a total deviation (the difference in population between the smallest and largest districts) of 9.92%. The smallest district is HD90 in Tarrant County (-8,209, -4.9%) and the largest is HD61 (8,417, 5.02%). Red-100 Report.

93. Mapdrawers assumed they could have a 10% top-to-bottom deviation range and put the map together with that assumption. Tr994 (Downton); Tr1473-74 (Interiano). There was no effort to minimize deviation beyond complying with the 10% top-to-bottom deviation. Downton 8-12-11 depo. (Joint Ex. J-

62) at 15; Tr1474.[1] For drop-in counties, ensuring population equality was left to the delegation members. Tr1474. Interiano advised the members to attempt to comply with one person, one vote, but there was no effort to get population equality beyond ensuring a 10% deviation. Tr1474; Interiano 8-2-11 depo. (Joint Ex. J-61) at 53-54. Interiano calculated deviation only statewide; he did not look at individual counties except to the degree it had to fit within statewide deviation. Interiano 8-26-11 depo. (Joint Ex. J-61) at 10-11. Solomons was not aware of any legal justification for the population deviations within counties, but assumed the staff would know why there were population deviations. Tr1596-98 (Solomons).

94. Given the adherence to the County Line Rule, the House map would necessarily have a top-to-bottom deviation close to 10%. However, districts within drop-in counties could have been drawn with little to no deviation from a county ideal.

95. Martin testified that there are fourteen counties with two or more whole districts contained within them, and they account for 93 of the 150 districts. Tr379-80. He testified that these 93 districts could have been drawn with zero or minimal population deviations. Tr380. Further, eight of the

---

[1] Downton testified at his deposition that they "made an effort to have a narrower range within the counties than the overall 10 percent range." Downton 8-31-11 depo. (Joint Ex. J-62) at 96. However, there was no effort to achieve minimal deviation, and the drop-in counties have significant population deviations. As noted, deviation issues beyond staying within 10% were left to the county delegations. At most, there is evidence that Downton attempted to decrease deviations by a small amount in Dallas County (to 8.88%) and in Hidalgo County.

fourteen counties (accounting for 75 districts) have a deviation over 3.5%. Tr380. Martin would give an "F" on good faith effort to minimize deviation. Tr381.

96. A large number of Texas House districts in Plan H283 deviate substantially from the ideal population, and there is more population disparity in Plan H283 than in the benchmark. Tr233 (Kousser). Professor Kousser opined that, if the Legislature had been trying to minimize deviations, a histogram of population deviations would have resembled a normal curve, with the largest number of districts clustered around zero deviations. Tr233; Joint Expert Ex. E-2 (Kousser Report) at 61. Instead, he noted, it is more U-shaped, with the largest number of districts between four and five percent underpopulated (23 districts) and four and five percent overpopulated (20 districts). Tr233; Joint Expert Ex. E-2 at 61, 63.[2] Looking only at Anglo-majority and Latino-majority districts, in general the Anglo districts are more underpopulated than overpopulated and the Latino districts are primarily overpopulated: 34/80 Anglo districts are overpopulated and 46/80 are underpopulated while 22/37 Latino districts are overpopulated and 15/37 are underpopulated.[3] Tr234 (Kousser); Joint Expert Ex. E-2 at 64-65. Dr. Arrington opined that usually the

---

[2] This is an increase from Plan H100, in which 37 districts had deviations over 4%. Joint Expert Ex. E-2 at 62, 63.

[3] Five of the underpopulated Latino districts are in El Paso County, where the population deficit combined with the County Line Rule required that all five districts be underpopulated compared to the state district ideal. Excluding those districts, more than twice as many Latino-majority districts are overpopulated than underpopulated. Tr235 (Kousser); Joint Expert Ex. E-2 (Kousser Report) at 64.

population deviations in a districting plan would be unimodal, with most of the population deviations clustering near the ideal population. US-355 at 7.

97. Kousser opined that Plan H283 was "not very compliant" with one person, one vote and that "the population disparities are clearly correlated with partisanship and ethnicity." Tr248-49. Kousser found that the population deviations were not justified and more heavily burdened Latinos. Tr249, Tr313. He did not consider whether incumbency protection played a role in the population deviations. Tr272-73.

98. Kousser also noted that districts in urban counties were generally overpopulated, including Republican districts (19 over and 15 under, with an average deviation of .47), but Democrat districts were more overpopulated (22 over and 17 under, with an average deviation of .94), and Latino Democrat districts were even more overpopulated (13 over and 6 under, with an average deviation of 1.17). Tr236 (Kousser); Joint Expert Ex. E-2 at 66. Kousser found "no particular pattern" for districts represented by Republicans in urban counties. Tr236. But he found a bias in Democrat districts, finding that they tended to be overpopulated. *Id.* And he found that districts represented by Latino Democrats were almost all overpopulated, such that Democrats were disadvantaged, but Latinos were even more disadvantaged. Tr235-37. Kousser noted that this difference cannot be explained simply by partisanship or by the County Line Rule. Tr237. He opined that this demonstrated that the Legislature acted with a partisan and racially discriminatory intent. Joint Expert Ex. E-2 at 67.

99. Dr. Alford testified that there is not a strong tendency toward a unimodal distribution around zero when redistricters start with existing districts and modify them based on new population data, as opposed to starting from scratch. TrJ1887-88. Alford testified that this was because mapdrawers were redistributing population while trying to preserve constituency representational relations and follow county lines, and they would stop when satisfied that they were within the top-to-bottom deviation. TrJ1888-89 (Alford). He also noted that both minority and Anglo districts in Plan H283 have a bimodal pattern. TrJ1890 (Alford). Alford concluded that the distribution indicates that population equality was balanced against other redistricting interests, the way that 10% leeway presumes it will be. *Id.* He also opined that the fact that the population deviations were not clustered around zero did not indicate a systematic or planned pattern of under or over population. *Id.*

100. Dr. Alford analyzed population deviations in his 2014 supplemental report. TrJ1867 (Alford). He divided the House districts in Plan H283 into minority and non-minority by CVAP and then compared how they were treated. TrJ1868 (Alford). Roughly 100 districts are non-minority and 50 or 52 are minority, depending on how one counts. *Id.* His count used minority CVAP (using the 2008-2012 ACS average) to capture HCVAP, BCVAP, and H+BCVAP minority districts, and the actual deviation numbers came from the 2010 Census. TrJ1868-69. He also used 2012 SSVR data. TrJ1869. He found that the average minority district is overpopulated by 232 people, and the average Anglo district undersized by 124 people. TrJ1870. In addition, SSVR majority/Hispanic

majority districts are undersized by 242 and Anglo majority districts (SSVR <50%) are oversized by 63. *Id.* Alford testified that an ideal district is around 168,000, so these are very small deviations from ideal. TrJ1871.

101. Dr. Alford also looked at adjusted average population deviation, taking into account drop-in counties and looking at deviation from county ideal for those. TrJ1872. For districts outside drop-in counties, he took all of the state population outside the drop-in counties and divided by the number of districts to get a new ideal for those districts. TrJ1873. He testified that this would take out the possibility that data are being obscured by drop-in county districts. *Id.* Using the adjusted average population deviations, minority-majority-CVAP districts are 172 underpopulated, majority-Anglo districts are 91 overpopulated, SSVR-majority districts are 80 overpopulated, and districts with SSVR below 50% are 21 underpopulated. TrJ1874 (Alford); D-168 (Alford March 14, 2014 Report Table 7 & Graphs D & E). He testified that these numbers show that the districts are close to ideal. TrJ1874.

102. Dr. Alford also analyzed all the drop-in counties as a whole (Bexar, Dallas, Denton, El Paso, Harris, Nueces, Tarrant, and Travis), using an adjusted countywide ideal, to see if on average the districts are being treated differently. This examines drop-in counties without the risk that the rest of state will obscure the results. TrJ1875 (Alford). In this analysis, minority-majority-CVAP districts are underpopulated by 149 persons; Anglo-CVAP-majority districts are on average 141 persons overpopulated; SSVR-majority districts are on average 626 persons

underpopulated; and districts with less than 50% SSVR are on average 209 persons above the county ideal. TrJ1874-77 (Alford); D-168 (Alford March 14, 2014 Report Table 8).

103. Dr. Alford testified that, based on statewide ideal population, there is not a discernible pattern of overpopulation of minority-CVAP or SSVR-majority districts or of underpopulation of Anglo-CVAP-majority districts. TrJ1880-82; D-172; D-173; D-174. He also testified that, based on county ideal population, there is no discernible pattern of systematically overpopulating minority-majority-CVAP districts or majority-SSVR districts in drop-in counties. TrJ1884-86; D-175; D-176.

104. Dr. Alford did not analyze population deviations within any one county such as Dallas, Harris, or Nueces County. TrJ1900 (Alford). Nor did he look for patterns by only considering the specific counties in which Plaintiffs allege that population deviations were used to disadvantage minorities. Dr. Alford agreed that population variations can be a tool to discriminate. TrJ1901.

105. Dr. Arrington admitted that statewide there is no systematic overpopulation of minority districts when the County Line Rule is taken into account. TrJ182. However, he noted that Peña's district was intentionally underpopulated and surrounding districts were overpopulated to allow Peña to win as a Republican in the face of the known opposition of Hispanic voters to Republican candidates. US-355 at 10-11. He also opined that deviations combined with bizarre district shapes suggest a possible racial bias in Dallas and Harris Counties, and his conclusion based

on the evidence was that any racially discriminatory effects must have been intentional. US-355 at 11-13.

106. The total deviation of Dallas County is 8.88%. Tr329 (Martin). Martin testified that there appeared to be no effort to draw a minimal deviation map. *Id.* He testified that a map could be drawn without deviation, and noted that the deviation of demonstration Plan H288 was only 1.74%, and that was easily achieved. Tr333-34. By minimizing deviation and not splitting minority population in northeast Dallas, that plan increased minority ability to elect. Tr335 (Martin).

107. In Dallas County, in Plan H283, the two Latino districts are overpopulated. Based on deviation from the statewide ideal district size, HD103 is overpopulated by 8,379 people (5%) (the most in the County) and HD104 is overpopulated by 5,147 people (3.07%). Of the four African-American districts, one is overpopulated (HD109 by 3.9%) and three are underpopulated (HD100 by 3.87%, HD110 by .05%, and HD111 by .39%). Thus, among the six minority districts in Dallas in Plan H283, three were overpopulated (HD103, HD104, and HD109) and three were underpopulated (HD100, HD110, and HD111). D-109; TrJ183 (Arrington). Of the eight Anglo-majority districts, four are underpopulated and four are overpopulated. HD102 is underpopulated by 3.88%; HD108 is underpopulated by 2.63%; HD112 is underpopulated by .35%; and HD115 is underpopulated by .54%. HD105 is overpopulated by 4.83%; HD107 is overpopulated by 2.53%; HD113 is overpopulated by 2.25%; and HD114 is overpopulated

by 2.8%.[4] Kousser opined that HD103 and HD104 were overpopulated to put as much Latino population as possible into those districts (packing), making it much more difficult to draw additional opportunity districts for the minority population growth. Dr. Arrington similarly noted that the Hispanic districts are overpopulated, and that makes it more difficult to create another minority district. TrJ222 (Arrington). Martin further noted that Anglo-district HD105 is overpopulated by 8,091 people, and because the additional population is Anglo population from the south, it makes it more difficult to draw an additional minority opportunity district in western Dallas County. Tr325 (Martin). Without those additional Anglos, the district is more likely to elect Latino candidates of choice. Tr326 (Martin).

108. Downton testified that he did not recall an effort to have a 1% deviation range within Dallas and explained the population deviations as resulting from an effort to maintain benchmark minority population levels. Downton 8-31-11 depo. (Joint Ex. J-62) at 97-98. He testified that because benchmark HD103 and HD104 were underpopulated (HD103 was 30% underpopulated, the most in the state), he did not think they could have gotten the districts to ideal population and also maintained their benchmark

---

[4] Dr. Arrington's rebuttal report, US-355 Table 1, analyzes the districts in Dallas County. He noted at trial that both Anglo and minority districts in Dallas County were roughly half under and half over-populated. TrJ183 (Arrington). However, his Table 1 only has 13 districts, leaving out HD100, a significantly underpopulated minority district. He agreed that including HD100 would completely change the results of the analysis. TrJ184-85.

levels of minority population (SSVR). *Id.* However, in his October 20, 2011 deposition, Downton testified that HD103 in Plan H283 was 8,379 above ideal population because he worked with Rep. Anchia to include that population. TrJ2148 (Downton). He further testified that it was not necessary to have a 5% deviation in HD103 to maintain the Hispanic population, and that there were others ways to have done it, "but that was a policy decision." TrJ2149.

109. The population deviation of Harris County in Plan H283 is 9.74%. Tr356 (Martin). Martin testified that it was easy to draw a plan with a deviation of only 1.81%. Tr357. Because the Legislature chose to go with 24 districts, there was enough population to have all districts be at ideal population or above. However, some districts were overpopulated and some were underpopulated. Three of the four Latino-majority districts (HD140, 145, and 148) were overpopulated, and four of the six African-American districts (HD131, HD139, HD146, and HD147) were overpopulated. HD137 is also overpopulated. Rep. Alvarado contended that this uses up minority population unnecessarily and limits the ability to draw new districts. Alvarado Decl. (docket no. 331) at 5; Hochberg Decl. (docket no. 331) at 3. Ten of the thirteen Anglo Republican districts were overpopulated, and the average overpopulation of these ten districts was 4,337, compared to 6,337 for the eight overpopulated minority/Democrat districts.

110. Interiano stated that, given the choice to have 24 districts in Harris County, the ideal population size for a district in the County was 170,519, slightly higher than the ideal state district size (167,637). Interiano Decl. (docket no. 370-2) at ¶ 2. He stated, for

example, that HD140 and HD145 are populated at 170,732 and 170,821, respectively, which is almost the ideal county size but several thousand above ideal state size. Interiano stated, "This overpopulation is due to the fact that Harris County was awarded twenty-four districts, not in order to avoid drawing an additional minority opportunity district. With that said, there were several instances where it was necessary to increase the population of a particular district either because a member specifically requested to have certain precincts and was unwilling to give up other populations or because the population was needed in order to maintain certain benchmarks, like the 50% Spanish Surname Voter Registration (SSVR) for Latinos or the existing levels of African-American voting age population." *Id.*

111. Rep. Walle raised the issue of minority district overpopulation in Harris County during second reading on April 27. D-13 at S235. No justification was given at the time for the population deviations.

112. Mapdrawers removed population (including the African-American community of Como, which has historically been part of the district) from HD90 in Tarrant County to raise its SSVR, leaving it underpopulated by 8,209 (-4.9%) and the smallest district in the state. D-190 at 685-89.

El Paso

113. In Plan H100, El Paso County had five districts wholly contained within it, and all five districts were majority-HCVAP using 2005-2009 ACS data. HD75 was 83.1% HCVAP; HD76 was 89.4% HCVAP; HD77 was 78.6% HCVAP; HD78 was 56.2%

HCVAP; and HD79 was 70% HCVAP. TrJ709 (Rodriguez); D-100 at 34.

114. In Plan H100, four districts were majority total SSVR and HD78 was not. HD75 was 75.6% total SSVR (75.9% non-suspense), HD76 was 84.1% total SSVR (84.4% non-suspense); HD77 was 72.6% total SSVR (73.1% non-suspense); HD78 was 47.1% total SSVR (47.5% non-suspense); HD79 was 64.6% total SSVR (65.2% non-suspense). TrJ1046 (Solomons); TrJ709 (Rodriguez); D-100.

115. In 2008, HD78 was an open seat (before that, the seat had long been represented by Republican Pat Haggerty), and Hispanic Democrat Joe Moody defeated Anglo Republican Dee Margo by a margin of 51.53% to 45.11% to represent HD78. Tr406 (Martin); TrJ880-81 (Moody).

116. In 2010, Margo defeated Moody by a margin of 52.41% to 47.59%. TrJ881 (Moody). Dr. Engstrom determined that the voting was racially polarized. He estimated that Latino support for the Latino incumbent Moody was 79.6% and non-Latino support was 28.4%. Tr510 (Engstrom). SSVR turnout was 34.88%. Tr510 (Engstrom). Margo was not the candidate of choice of Hispanic voters. Joint Expert Ex. E-2 (Kousser Report) at 46; US-351 (Handley Report) at 34.

117. At the time of redistricting, El Paso County was 82% Hispanic in terms of total population and was 74.74% estimated HCVAP based on 2005-2009 ACS data. TrJ716 (Rodriguez); D-218; Chapa Table 1; Gonzalez-Baker Report Table 3; PL-297.

118. In 2011, the incumbents were four Democrats and one Anglo Republican: Chente Quintanilla

(Hispanic, Democrat) (HD75); Naomi Gonzalez (Hispanic, Democrat) (HD76), Marisa Marquez (Hispanic, Democrat) (HD77), Dee Margo (Anglo, Republican) (HD78), and Joe Pickett (Anglo, Democrat) (HD79). TrJ730 (Pickett).

119. As in Plan H100, all five El Paso districts in Plan H283 are majority-HCVAP districts using 2005-2009 ACS data. HD75 is 89% HCVAP; HD76 is 83.5% HCVAP; HD77 is 73.4% HCVAP; HD78 is 55.2% HCVAP; HD 79 is 76.7 HCVAP. D-109 at 44. HD78 HCVAP% decreased from 56.2% to 55.2% between Plan H100 and H283.

120. In Plan H283, as in Plan H100, four districts are majority total SSVR and HD78 is not. HD75 is 81% total SSVR (81.2% non-suspense); HD76 is 80.7% total SSVR (81.3% non-suspense), HD77 is 66% total SSVR (66.4% non-suspense); HD78 is 46.8% total SSVR (47.1% non-suspense); and HD79 is 69% total SSVR (69.3% non-suspense). Total and non-suspense SSVR are lower in HD78 than in the benchmark plan.

121. El Paso was a drop-in county with five districts (the number did not change from the benchmark). Tr923 (Downton); TrJ731 (Pickett). Solomons and Downton told the El Paso delegation to draw their five districts, staying within El Paso County. Tr923 (Downton). Around March 1, Solomons told Pickett that, since he was on the HRC, he should take the lead for El Paso and come up with a map for Solomons' staff to review. TrJ732, TrJ783 (Pickett). Pickett was "the dean" of the El Paso delegation. Tr923 (Downton); TrJ1045 (Solomons).

122. In the benchmark plan, HD77 had a northeast extension and a middle "horn," and there were also

extensions towards the east coming out of the southern portion into HD76. TrJ738 (Pickett).

123. Changes were necessary to the El Paso districts to equalize the population. HD75 was 51,771 overpopulated; HD76 was 34,922 underpopulated; HD77 was 35,070 underpopulated; HD78 was 1,148 overpopulated; and HD79 was 20,465 underpopulated. D-100 at 17; TrJ720 (Rodriguez); TrJ734, TrJ786 (Pickett) (goals included equalizing population and that was going to be the biggest challenge); Marquez depo. at 18.

124. Geographic factors play a role in drawing districts in El Paso County. The Davis Mountains, state and international boundary lines, and federal installations all influence the map. D-267; TrJ717-18 (Rodriguez) ("There's no question the mountain range is a factor, and certainly the international boundary, the federal installation Fort Bliss, and Biggs Army airfield are also factors. Those are all considerations."); TrJ736 (Pickett) (the mountains, Ft. Bliss, and New Mexico and Mexico lines are factors in drawing lines).

125. Pickett asked the delegation members to participate and bring him comments or maps. TrJ732, TrJ783 (Pickett); Marquez depo. at 24:7-13. Pickett also prepared maps. TrJ733 (Pickett). The Pickett RedAppl plan log shows that Pickett and/or his staff were drafting some possibilities in early March. PL-703.

126. Marquez and Gonzales sat down on RedAppl and drew a proposed plan, which they shared with Pickett. On March 14, a plan from Marquez's RedAppl account was shared with Pickett's account. PL-703 (pick plan log); D-307 (map of pickH111). Pickett was

very upset by how his district was drawn, and he rejected it. Marquez depo. at 24:14-24; 28:8-10; TrJ757-59 (Pickett).

127. On March 15, Pickett sent Solomons a proposed El Paso House plan. PL-613 (solo plan list); D-271(solo plan list); TrJ1046-54 (Solomons). The plan appears in Solomons' RedAppl account plan list as soloH108 and was created on March 15, 2011. PL-613; D-271. The comments said, "From Pickett; El Paso House plan." PL-613; D-271. This map (PL-501) is the same as pickH113 (PL-495) in Pickett's RedAppl account. This map (1) has what was referred to at trial as the "chef's hat" configuration at the top of the northeast antler/extension in HD78; (2) has no long northwest antler/extension; (3) has no split precincts along the HD77/HD78 boundary; (4) has an HD77 protrusion into HD76; and (5) has a total SSVR of 47.4% (compared to benchmark 47.1%) in HD78. PL-501 (map packet); D-300 (map); PL-733 (TLC report); TrJ1049 (Solomons). Bruce asked Pickett if he had approval from other delegation members for this map. He said no, so she told him to let her know when everybody signed off. TrJ1951 (Bruce).

128. Around March 16, Pickett presented his preferred map (which was similar to pickH113 except HD77 no longer protruded into HD76) to the delegation members and asked them to review it on RedAppl and sign the map so he could provide a delegation map to the HRC. TrJ755 (Pickett); Marquez depo. at 33:19-22; 39:19-22; 40:10-13. Marquez had some concerns about her district (HD77), including the loss of geography to HD76 (Gonzalez's district). Marquez was concerned about the loss of Latino areas and gain of Anglo areas, and a decline in SSVR.

Marquez depo. at 35-38, 42-45. When she talked to Gonzalez about it, Gonzalez replied that she did not draw the map. Marquez depo. at 43:8-9. When Marquez expressed her concerns to Pickett, he said, "You'll be fine." Marquez depo. at 44:5-9.

129. Marquez continued to express concerns and asked to make additional changes. TrJ785 (Pickett). Pickett's initial reaction was that it was too late and that she could not make changes. TrJ774 (Pickett). She persisted. TrJ785 (Pickett). Pickett eventually told Marquez that she could change her district and Margo's district (HD78) by mutual agreement, but could not change the other three districts. Marquez depo. at 49:1-5; TrJ765, TrJ785-86, 790. Marquez then approached Margo with her proposed changes, and Margo agreed. Marquez depo. at 50:4-6; TrJ809 (Margo). Marquez had been concerned that her district's SSVR percentage was lower; she moved the district line between HD77 and HD78 in RedAppl and determined which precinct changes would increase her SSVR numbers; if she liked it, she asked Margo for the particular precincts. Marquez depo. at 50:19-22. Marquez asked Margo if she could take some precincts with high Hispanic numbers, and he agreed. *Id.* at 50:10-12. It is not clear whether Marquez told Margo that she wanted high Hispanic precincts or simply told him which areas of the map she wanted in her district. *Id.* at 52:1-4. She was also concerned about whether potential opponents were in her district. TrJ821 (Margo). The map with their agreed changes was submitted to Pickett's RedAppl account on March 21. This map had two antlers in HD77 and also a middle horn. D-303; PL-503. Compared to Pickett's preferred map, the total SSVR of HD77 (Marquez's district) is

higher and the SSVR of HD78 (Margo's district) is lower. Plan pickH120 is the agreed map between Marquez and Margo. TrJ790 (Pickett).

130. On March 21, Pickett's staff (on Pickett's behalf) sent Solomons two proposed El Paso House plans. PL-613 (solo plan list); D-271 (solo plan list); TrJ762-63 (Pickett). The maps were the agreed-upon delegation map that Pickett preferred (pickH118) ("the Pickett map") and the map with changes along the boundary between HD77 and HD78 that were agreed between Margo and Marquez (pickH120) ("the Marquez map"). These appeared in Solomons' RedAppl account plan list on March 21, 2011 as soloH109 and soloH110.

131. Plan soloH109 (PL-504) is the Pickett map (it is the same as pickH118 in Pickett's RedAppl plan account (PL-500)). The soloH109 plan has the same chef's hat configuration in the northeast extension as the March 15 plan, has no long northwest extension, and the SSVR for HD78 is 47.4%. PL-504 (map); D-301 (map). Pickett and/or his staff played the primary role in developing this map, without a lot of input from the delegation members other than Quintanilla and his staff. TrJ756-57 (Pickett); TrJ784-85 (Pickett).

132. Plan soloH110 (PL-505) is the Marquez map (it is the same as pickH120 in Pickett's RedAppl plan log (PL-503)). This is the map in which Marquez and Margo changed the boundary between their districts without changing the other three districts, which are the same as in Pickett's preferred map. In this map, the configuration of HD77 has a longer, thinner extension to the northeast than the prior "chef's hat" extension, and it has a long extension to the northwest not present in the benchmark or Pickett's map. In

addition to the antlers in HD77, there is also a tall middle horn. PL-505; D-302. The total SSVR for HD78 is 45.8% (below benchmark).

133. Neither the Pickett map nor the Marquez map had split precincts along the border of HD77 and HD78.

134. Pickett testified that he told Solomons that he had an agreed-upon map by the delegation members, and that one of them kept coming back with concerns. He told Solomons, "It is up to you how you want to handle it." TrJ765(Pickett). Pickett's map, soloH109, with the chef's hat and no long northwestern extension was not the proposal that moved forward and was adopted. The version that Downton put in the plan was Marquez's map, soloH110, which included the two antlers and a middle horn configuration and had an SSVR of 45.8%. TrJ2104-05 (Downton).

135. Downton testified that Pickett told him the "el paso #2 version" (the Marquez map) was the consensus version to put into the map. TrJ2104 (Downton). This testimony is not credible and conflicts with Pickett's testimony.

136. Neither Interiano nor Downton had any role in creating the initial configuration of El Paso. Tr1445 (Interiano); TrJ2101 (Downton).

137. On March 23, the Marquez plan ("el paso #2 version") appeared in Downton's RedAppl account plan list as hrc1H169 created and last modified 3/23/2011 1:18 PM. PL-615 (hrc1 account plan list). This plan was sent to Downton's account from Solomons' account by Bruce. D-244; PL-506; TrJ1992-93 (Downton). Downton says he changed the description to "received from Pickett" because if a plan

was forwarded from another account like Solomons' account, he would change it to indicate the person who actually drafted the map. TrJ1992. Downton is not sure when he received it; it could have been before March 23, since RedAppl only indicates when a plan is first saved. TrJ1993. Downton incorporated the configuration into his draft statewide map hrc1H215. TrJ1996-98 (Downton); PL-1615.

138. Sometime around April 5, Margo signed his approval on a map of his district. D-209; D-229 at 75. This map came from plan hrc1H215 dated April 1, 2011. D-209. The configuration of HD77 and HD78 in this map is the same as the Marquez map. TrJ1996 (Downton); TrJ790-92 (Pickett); D-279 at 2.

139. On April 7, Hanna wrote his first retrogression memo. TrJ1155-56 (Hanna); D-122. For El Paso, the memo notes that proposed HD78 has 45.8% total SSVR (benchmark was 47.1%), the other El Paso districts have SSVR between 67.2 and 81%, and "the slight decrease in SSVR in District 78 does present some level of risk of retrogression that likely could easily be remedied by swapping some precincts with an adjoining district. Section 5 analysis frequently focuses on the differences in minority voting strength in adjacent districts." Hanna recommended swapping precincts; he did not recommend splitting precincts. TrJ1083 (Solomons); TrJ1158 (Hanna); TrJ2001 (Downton).

140. Downton testified that he made changes along the boundary between HD77 and HD78 with the goal of complying with § 5 of the VRA by raising the SSVR level of HD78. TrJ2002, TrJ2102. In making his changes, Downton reviewed the other two plans that had been received in the solo account from Pickett on

March 15 ("El Paso House Plan") and March 21 (Pickett's map). TrJ2012. These show up in Downton's hrc1 account on April 11 as hrc1H260 and hrc1H261. TrJ2009, TrJ2012. Downton created hrc1H258, "full state 7" on April 11 at 12:26 and then at 12:27 opened the two Pickett maps. When he opened "Pickett 2" on April 11 at 12:27, he had already started working on hrcH258 (created at 12:26). TrJ2012. Downton did not use Pickett's preferred map, which had a higher SSVR, but instead continued working on the Marquez map. Downton's changes to the El Paso configuration were incorporated into the full state map on April 11. TrJ2129 (Downton); PL-615. By April 11, 2011 at 2:25 p.m., Downton had completed the final El Paso configuration.

141. Downton "tweaked" the El Paso map by altering the boundary between HD77 and HD78. Tr1003-04 (Downton). Downton's "tweaks" were made based on race and to raise the SSVR of HD78. Tr1004, TrJ2103 (Downton). The changes included removing Precinct 23 from HD78 and making changes to the northeast antler that resulted in the so-called "anteater" configuration. Downton did not try to incorporate any input from Margo or Marquez about precincts or neighborhoods that they wanted in their districts. TrJ2103 (Downton). Downton looked at block level data for Hispanic population while making these changes. TrJ2117 (Hispanic). He split precincts and moved blocks across the boundaries between HD77 and HD78 based on that Hispanic population. TrJ2117 (Downton); TrJ1004 (Downton) ("I did look at the Hispanic population to try to raise that back up and did raise it back up."). Downton split fourteen precincts. It was not necessary to split precincts to

raise the SSVR of HD78 above benchmark. TrJ1603-04 (Downton); TrJ2109-13 (Downton); TrJ2116 (Downton); PL-1007; TrJ2151-52; PL-733; PL-712; PL-713.

142. Moody testified that he could see no reason based on income, housing, or ethnic makeup of certain precincts to divide the precincts in the way Downton did. TrJ840-43 (Precinct 10), TrJ852-53 (Precinct 17); TrJ853-54 (Precinct 24, and noting that it split a cohesive neighborhood); TrJ854-55 (Precinct 25); TrJ863-64 (Precinct 43); TrJ864-65 (Precinct 45); TrJ867 (Precinct 49, and noting that it split a cohesive neighborhood); TrJ867-69 (Precinct 47); TrJ869-70 (Precinct 55).

143. As noted, Downton admitting splitting precincts on the basis of race, using block level Hispanic shading. TrJ2118 (Downton) (saying he put the "heavily Hispanic concentrated portion in 78 and the non-Hispanic portion in 77"); PL-1012. But Downton was selective in choosing which Hispanic areas to include in HD78. TrJ2118-19 (Downton).

144. Although Downton denied watching political results while splitting precincts to raise the SSVR to achieve the lowest possible percentage of votes for Latino-preferred candidates, TrJ2119, that testimony is not credible. Downton admitted that while mapping, he had election data showing (likely the McCain/Obama 2008 contest) and kept an eye on changes in election results. TrJ2119-20. Downton did not exchange whole precincts to raise the SSVR, even though that was suggested by Hanna and he could have easily done so. Rather, he chose specific areas of precincts to include and exclude from HD78, and often did not include Hispanic population nearby in HD78.

This suggests that Downton had a purpose other than simply raising the SSVR. Therefore, Downton was using race-based data to increase the SSVR of the district, while simultaneously watching the election results to ensure they remained favorable to the Anglo Republican incumbent and therefore less favorable to the Latino-preferred candidate. In addition to the method used by Downton, this fact is shown by the ultimate result he achieved. Although Downton increased the SSVR in HD78 from 45.8 to 46.8%, he kept the political performance close to where it had been in the Marquez map. In the 2006 general election for Lieutenant Governor, Dewhurst went from 59.9% to 59.6% and Alvarado went from 40.1% to 40.4%. PL-503 at 56; D-109 at 1989. Keller went from 53.9% to 53.5% and Molina went from 46.1% to 46.5% in the CCA Presiding Judge race. PL-503 at 56; D-109 at 1990. At the same time, the SSVR% in the election went from 43.9% in Marquez's map pickH120 to 44.9% in H283. PL-503 at 56; D-109 at 1990. Thus, although he increased the total SSVR by 1%, election performance for the Latino-preferred candidate only increased .3 or .4%.

145. Downton's changes did not change the population deviation percentages, which are identical to the deviations in Marquez's map (though the actual population numbers changed slightly). D-109 at 141; D-279 at 77.

146. In the hrc1 plan account, plan hrc1H265 created April 12 is described as "Full State 9," which was Downton's "notation for the ninth iteration of [his] full state map." TrJ2002 (Downton); D-270. This plan was last modified April 13 at 2:45 p.m. TrJ2002; D-270. This map reflects the changes that he made in El

Paso. TrJ2003 (Downton); D-351 (map). The total SSVR for HD78 in this map is 46.8%, which is higher than the hrc1H215 SSVR and the one that Margo signed. TrJ2003 (Downton).

147. Hanna's second retrogression memo was done around April 12 on non-public Plan H110 (the source for this plan was hrc1H265). D-327. Plan H110 contained Downton's changes. D-368. Hanna noted that the total SSVR of HD78 was now 46.8%, and said, "The minor decreases in the SSVR in Districts 77 and 78 will not likely present retrogression issues." D-327. No further changes were made to the El Paso configuration after this. TrJ2006 (Downton). The third retrogression memo notes that HD78 in Plan H153 still has 46.8% total SSVR. TrJ2007 (Downton); D-123.

148. Margo was not happy with the changes made by Downton, since he felt he lost some areas that had performed favorably for him and he felt his Republican performance decreased. TrJ808-16 (Margo). Margo lost Precinct 23 and an area named "Festival," which went into HD77. TrJ811, TrJ823-24 (Margo). Festival had been a strong area for him in 2010; it included Coronado Country Club, his district office, the residence of his mother-in-law, and most of his financial supporters. TrJ812 (Margo). Margo also lost a portion of North Hills, where he had spent a lot of time campaigning and that had been a good area for him in 2010. He did not want to lose that area. TrJ814-15 (Margo). Margo also lost an area in the Upper Valley, where his support included a substantial number of Hispanic Republicans. TrJ813 (Margo). Margo testified that the changes meant he was giving up Republican precincts to HD77. TrJ815-16.

149. Plan H113 was released April 13. On April 13 at 4:46 p.m., the Downton-revised plan for El Paso County was sent from the hrc1 account to Pickett's RedAppl account, and it appears in Pickett's plan list as pickH121. PL-515.

150. On April 22, Stacy Napier from the OAG sent an RPVA summary for Plan H153 to Bruce and Downton that included an election analysis for HD78. US-190/190A. Bruce shared it with Solomons and Interiano. TrJ1957-58 (Bruce). The analysis showed that in Plan H153 the Latino-preferred candidate was elected in 2 out of 10 races, which was the same as the benchmark Plan H100, but the margin of victory for the two prevailing Latino candidates had been reduced compared to the benchmark, and the margin of victory for the prevailing non-Latino-preferred candidates had been increased. US-190/190A. Interiano reviewed the RPVA before the House plan was adopted. TrA5, TrA10 (Interiano).

151. On April 27 at the floor debate, Rep. Coleman introduced Plan H232. He noted that in Solomons' proposed plan, four of the districts ranged between 73% and 92% HVAP, while HD78, which only elected the Hispanic candidate of choice once in the last decade, was only 62.8% HVAP. His substitute would have increased SSVR and HVAP in HD78 to make it more likely to perform effectively. D-13 at S248-49. It was tabled.

152. The configuration of El Paso did not change between Plan H113, released April 13, and Plan H283, the enacted plan. Plan H283 contains the fourteen precinct splits along the boundary of HD77 and HD78 incorporated by Downton. TrJ1045 (Solomons); TrJ2117 (Downton); PL-733 (split precincts report).

The SSVR of HD78 remained below benchmark at 46.8%. Thus, as noted, all five El Paso districts were majority-HCVAP but only four were majority-SSVR.

153. Senator Jose Rodriguez testified that both partisanship and racial considerations are evident in the El Paso map. TrJ695 (Rodriguez); D-158 (showing lines of HD77 track Democrat shading in many respects).

154. In Plan H283, the distribution of the Latino population and SSVR is uneven across the five House districts, with HD78 being disproportionately low. TrJ697 (Rodriguez), D-109 at 44; Joint Expert Ex. E-8 (Flores Report) at 9.

155. It would have been possible to draw five more compact districts and to increase the SSVR of HD78 above 50%. Tr378-79 (Martin) (citing Plan H232); Tr1052 (Murray); TrJ462 (Flores) (citing Plan H292). Hanna testified that it was possible to create an additional minority opportunity district in El Paso County and that a number of plans were submitted to the Legislature that created an additional opportunity district. TrJ1174, TrJ1206 (Hanna). The Legislature chose not to increase the SSVR of HD78 above 50% because it would not benefit the Anglo Republican incumbent. Joint Expert Ex. E-4 (Murray Report) at 34.

156. Downton testified that it was "a political decision as to how to draw the districts" and that "an effort was made to give the Republican representative a chance to be reelected." Tr1006. Mapdrawers could have created another majority [SSVR] Hispanic district in El Paso, but made a "policy choice" not to. TrJ2043 (Downton).

157. Interiano did not consider HD78 to be a Latino opportunity district in the benchmark or in Plan H283. Tr1444 (Interiano); Interiano 8-2-11 depo (Joint Ex. J-61) at 143-44. Interiano testified that he discussed with outside counsel whether § 2 required five Latino opportunity districts (measured by a 50% SSVR threshold) in El Paso, but that he did not undertake his own separate inquiry. Interiano 8-2-11 depo. (Joint Ex. J-61) at 166. Solomons did not make an independent determination of whether El Paso needed an additional Latino opportunity district (measured by a 50% SSVR threshold). Tr1601-02 (Solomons).

158. Interiano testified that he never tried to draw an additional Latino opportunity district in El Paso because Pickett and the El Paso delegation were working on a drop-in map. Tr1444-46, TrJ1563 (Interiano). However, this testimony is not credible. On April 13 someone in his account received or created a "VRA" version of El Paso County, in which the SSVR of HD78 was increased to 52.6%, and sent it to David Hanna. At 8:58 p.m. on April 13, 2011, plan strjH244 was created in the strj Red Appl plan account. Its description says "CURRENT DISTRICTS - El Paso Changes0 [sic]" and the comments say, "Copy of PLANH113." PL-517. It was last modified at 9:00 p.m. April 13, 2011. In this plan, HD78 is compact and has no antlers, and the total SSVR for HD78 is 52.6%, which was higher than the benchmark. TrJ1565 (Interiano); PL-517. Right after strjH244 was saved, strjH245 was saved with the description "El Paso - VRA" and its comments say "Copy of STRJH244." PL-518. The SSVR for HD78 is also 52.6%. These two maps appear to be identical. PL-517; PL-518. Thus,

someone in the account started with Plan H113 and then modified El Paso County, increasing the SSVR in HD78. Later in the evening of April 13, the same El Paso County configuration appears in Hanna's Red Appl account, as drh1H115. PL-512. Interiano sent this plan to Hanna at 9:04 p.m. on April 13, 2011. TrJ1569 (Interiano). The evidence indicates that Interiano drew this map. TrJ1567 (Interiano) (admitting that it was possible that he drew the map).

159. Dr. Engstrom concluded that HD78 was a Latino opportunity district in Plan H100. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25. Engstrom concluded that HD78 was not a Latino opportunity district in Plan H283. *Id.* at 28. Engstrom considers Latinos to have a reasonable opportunity in a district when their preferred candidates win a majority of the votes cast more often than not in the seven general elections and six Democratic primaries that he studied. *Id.*

160. Martin thought benchmark HD78 (at 47.5% SSVR) was an effective Latino opportunity district because it elected a Latino candidate of choice in 2008 (Joe Moody, a Hispanic Democrat) and had been preferring other candidates of choice in statewide elections as well. Tr406 (Martin).

161. Dr. Handley found that benchmark HD78 had an endogenous minority effectiveness index of 20% and an exogenous minority effectiveness index of 20%. US-351 (Handley Report) at 4-5. She concluded that benchmark HD78 did not offer Hispanic voters an ability to elect candidates of choice when election performance is considered. *Id.* at 5-6. Handley also opined that HD78 in Plan H283 was not likely to provide Hispanic voters with an ability to elect their

preferred candidates because the exogenous index score was 20%. *Id.* at 9.

162. Dr. Flores opined that HD78 is not a Latino opportunity district in Plan H283. Tr462.

163. The Task Force offers Plan H292, which has five SSVR-majority Latino opportunity districts. Joint Map Ex. J-37; PL-340 (map); D-111; Tr462 (Flores). HD78 in H292 reflects the growing Latino population in downtown, the Westside, and the town of Canutillo. PL-414 (Sergio Coronado Decl.) ¶ 13. HD78 encompasses the growing Latino population. PL-414 ¶ 15; PL-418 (Carmen Rodriguez Decl.) ¶ 23.

164. There are Hispanic Republicans in El Paso County and in HD78. TrJ694, TrJ722 (Rodriguez).

165. Dr. Engstrom (Joint Expert Ex. E-7) found that Latino voters are highly cohesive in support of Latino candidates with the Democratic Primary nomination in general elections. The only Latino Republican nominee, Guzman, was not supported by Latino voters in the general election. He found that all Latino candidates in Democratic primaries also received strong support from Latinos. Latinos voting in the Republican primary did support the Latino candidate for Railroad Commissioner, but not for Governor. Non-Latino voters provided weak support for all five of the Latino candidates favored by Latino voters in the general election, according to bivariate analysis. They also supported the only Republican candidate that was a Latino with an estimated 73.8% of their votes. They also provided majority support for only one of the Latinos seeking nominations in the Democratic primaries, and did not favor either Latino candidate in Republican primaries. He concluded that

Latinos in El Paso County are very cohesive in their candidate preferences for Latino candidates, in both general elections and Democratic primaries. This preference was shared only once by the non-Latino voters in the county.

166. In his corrected rebuttal report (docket no. 307-1), Dr. Engstrom concluded that voting in the general election for HD78 in 2010 was racially polarized. Latino support for the incumbent was estimated to be 79.6% in a bivariate analysis, with non-Latino/Anglo support estimated to be 28.4%. SSVR turnout percent was estimated at 34.88%, and incumbent Moody received 47.59% of the overall vote.

167. Because El Paso's population was not enough for five ideal districts, all five districts in El Paso are underpopulated compared to the ideal district population. Red-202 Report; Joint Expert Ex. E-5 (Martin Report) (noting that population deviation is not an issue in El Paso).

168. 34.1% of Hispanics in El Paso County lack a high school education. Joint Expert Ex. E-1 (Chapa Report) Table 4. The per capita income for Hispanics was $13,582, compared to $32,570 for non-Hispanic Anglos. *Id.* Table 5.

169. Carmen Rodriguez filed a declaration stating that she has lived in El Paso for the past thirty years. She remembers her father discussing the poll tax and his struggles to pay it. PL-418 ¶ 5. She states that there is a constant struggle to encourage voter participation in the Latino neighborhoods of El Paso, but the population has begun to see more Latino elected officials and government employees. PL-418 ¶ 6. She notes that Lubbock, which is much smaller, has

a major medical university and a law school, while El Paso does not have a law school and relies on a Texas Tech satellite campus for the only medical school in the County. PL-418 ¶ 7. Rodriguez noted that El Paso had *de jure* segregation through the 1970s in its public schools until the *Alvarado v. El Paso ISD* case desegregated the schools. PL-418 ¶ 10.

170. The delegation members were primarily responsible for the initial configuration of the El Paso districts. El Paso is an example of the member-driven process ensuring that maps will be drawn to benefit the members and not necessarily to ensure compliance with the VRA.

171. Rep. Marquez drew lines based on race to add Hispanics and increase SSVR in her district while placing Anglos in Margo's district HD78. These race-based lines were put into the final map (with some further race-based modifications by Downton). There is no evidence that Marquez's use of race was to disadvantage Hispanics (*i.e*, there is no evidence of discriminatory intent); rather, it was to increase her own electoral prospects. Nevertheless, this use of race was improper.

172. Downton admitted to using block-level racial shading to split precincts along the border of HD78 and HD77 based on race in order to increase the SSVR of HD78 to ameliorate § 5 retrogression concerns. At the same time, however, he chose specific Hispanic areas that would increase the SSVR while simultaneously remaining as favorable to the Anglo incumbent as possible. He accomplished this goal and raised the SSVR by 1% while improving the performance of Latino-preferred candidates in the district by only .3 or .4 %.

173. All five El Paso districts were HCVAP-majority in the benchmark and remained so in Plan H283.

174. Four of the five districts were SSVR-majority in the benchmark (all but HD78) and it remained that way in Plan H283, though the SSVR of HD78 was decreased slightly.

Bexar County

175. In the 2001 redistricting cycle, DOJ noted that when Bexar County went from eleven to ten districts, the State unnecessarily eliminated a Latino opportunity district, and DOJ rejected the State's argument that there were sufficient new Latino opportunity districts to offset the loss. The court's plan remedied the DOJ's retrogression concerns about the loss of a Latino district in Bexar County. *Balderas v. Texas*, No. 6:01-CV-158, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), *summarily aff'd*, 536 U.S. 919 (2002). The court reconstituted a seventh majority-Latino district in Bexar County and equalized the SSVR (of at least 55%) across all seven Latino districts.

176. In Plan H100, Bexar County had ten districts, seven of which (HD116, 117, 118, 119, 123, 124, and 125) were majority HCVAP using 2005-2009 ACS data. All seven districts also were SSVR majority, though the total SSVR of HD117 had dropped to 50.3% (50.8% non-suspense) while the other six districts remained in the 55-56% total SSVR range.

177. In the 2011 redistricting cycle, Bexar County maintained ten districts without excess population, and Bexar County was therefore a drop-in county. TrJ196 (Arrington); TrJ1074 (Solomons); TrJ1517 (Interiano).

178. In 2011, the Bexar County delegation was seven Democrats and three Republicans. TrJ338 (Farias); TrJ196 (Arrington). The seven Democrats included six Hispanic Democrats and one African-American Democrat, and included Rep. Mike Villarreal, vice-chair of the HRC, and Rep. Jose "Joe" Farias. The Republicans included Speaker Joe Straus (Anglo), Rep. John Garza (Hispanic), and Rep. Lyle Larson (Anglo).

179. John Garza represented HD117 in the 82nd Legislature. TrJ356 (Garza). He is a Hispanic Republican. TrJ358, TrJ413. He first ran in 2008 and lost. He ran again and won in 2010 by a margin of 1,070 votes. TrJ358, TrJ362 (Garza). Garza was not the Hispanic candidate of choice. TrJ125 (Arrington); Joint Expert Ex. E-2 (Kousser Report) at 46; US-351 (Handley Report) at 35. He was a member of MALC in 2011. TrJ415.

180. Benchmark HD117 had a total SSVR of 50.3% and non-suspense SSVR was 50.8%. TrJ360. It had 58.8% HCVAP using 2005-2009 ACS data and 57.7% using 2008-2012 ACS data. It was considered to be a protected Latino opportunity district, and Garza knew it was a protected district under the VRA. TrJ363, TrJ416 (Garza). Benchmark HD117 was overpopulated by 52,723 persons. TrJ416 (Garza); D-100.

181. Dr. Arrington concluded that HD117 voters had the ability to elect in the benchmark but did not in Plan H283. TrJ119, TrJ124. Benchmark HD117 elected the Hispanic-preferred candidate in 2004, 2006, and 2008, but not 2002 or 2010. TrJ125 (Arrington). The Hispanic-preferred candidate won 3/5 elections (60%) in both the endogenous and exogenous

effectiveness indices for benchmark HD117. TrJ125 (Arrington); US-351 (Handley Report) at 5; US-363 (Red-225 report). In benchmark HD117, Molina (Hispanic, Democrat) got 51.2% of the vote in the race for Court of Criminal Appeals presiding judge in the 2006 general election. TrJ395 (Garza).

182. In the enacted Plan H283, HD117 HCVAP (using 2005-2009 ACS data) increased to 63.8% from 58.8% in the benchmark, while total SSVR was reduced from 50.3% to 50.1% and nonsuspense SSVR was reduced from 50.8% to 50.1%. HD117 in Plan H283 had an exogenous election index of 20% (1/5 elections), compared to 60% in the benchmark. TrJ126 (Arrington); US-351 (Handley Report) at 5, 11. Dr. Arrington testified that, because it went from 60% to 20% effectiveness, HD117 ceased to be a reasonable opportunity for the Hispanic-preferred candidate to win. TrJ126. Although total SSVR dropped only .2% from the benchmark, Molina's reconstituted performance in the 2006 general election dropped from 51.2% to 48.8%. TrJ395 (Garza).

183. The State's expert, Dr. Alford, testified that Democrats win in benchmark HD117 60% of the time (29 of 48 contested statewide elections), while in Plan H283 that is reduced to 33% (16 of 48). US-350 (Alford Oct. 2011 report) at 10-11.

184. HD117 in Plan H283 was drawn by Interiano, Rep. Garza, and Garza's and Rep. Larson's staffers. TrA53 (Interiano). It was designed to give Garza, who was not the Hispanic-preferred candidate, the best chance at being re-elected, while keeping the HCVAP and SSVR statistics consistent with a Latino opportunity district (*i.e.*, keeping SSVR above 50%).

185. Jose "Joe" Farias represented HD118 in the 82nd Legislature. TrJ312 (Farias). He was first elected in 2006. TrJ313 (Farias). Although he was a member of MALC, he was not very involved with MALC in the redistricting process. TrJ315 (Farias). HD118 was adjacent to Garza's district HD117.

186. Benchmark HD118 included the City of Somerset and the neighborhood of Whispering Winds. US-290. Somerset was a small, poor, rural, mostly Hispanic city. US-66 (total population 1,631; 76.9% Hispanic). Whispering Winds was also very poor and predominantly Hispanic. TrJ322-23 (Farias). These areas had been neglected and had been having trouble with water service provided by Bexar Met, a water district that served rural parts of Bexar County. TrJ317 (Farias). Farias had worked to abolish Bexar Met and bring the areas within the City water system, but that had failed, and problems continued with Bexar Met. TrJ318 (Farias). Farias testified that the Bexar Met issue was "very big" to these areas and he voted to abolish Bexar Met, while Garza voted the opposite. TrJ324-25. Farias had spent a lot of time in Somerset and Whispering Winds campaigning and engaging in community support. TrJ321 (Farias). Both these areas had low Hispanic voter turnout. TrJ323-24 (Farias). Farias had lost some precincts to Republican challengers in those areas, which he attributed to low Hispanic voter turnout. TrJ336-37 (Farias).

187. Although Interiano played a large role in the Bexar County map, Downton did not draw or otherwise participate in the Bexar County map. TrJ2057 (Downton).

188. The Bexar County delegation began working on their county map around February 24. On February 24, 2011, Villarreal sent an email to the members of the Bexar County delegation, asking members to "[p]lease draw your ideal district taking into account your surrounding neighbors and three recommended parameters," including: "1) there should be 10 House districts in Bexar County; 2) try to keep all districts within a +/- 5% deviation; and 3) do not eliminate any minority-majority voting age districts." D-265. He asked them to get their maps to him before their meeting the next week. He also stated, "To judge the political balance of your districts, I recommend using a midterm election, supreme court or court of criminal appeals race where there is a Democratic and Republican candidate and where neither candidate has a Hispanic Surname. I would avoid using 2010. 2010 is a worst case scenario for Democrats, while 2008 is a best case scenario. The only race that fits these conditions is the 2006 Supreme Court [Place] 2 race [Don Willett v. Bill Moody]. I recommend we all use this race or another one the group agrees to so we can judge each others [*sic*] maps using the same political rule. The Dean of our delegation, Ruth Jones McClendon will be convening us next week to discuss redistricting. I will bring to the meeting maps that illustrate how Bexar County has been changing politically and demographically. I am asking Gerardo [Interiano], the Speakers [*sic*] attorney[,] to join us to answer any legal questions. I would also like to include MALC's attorney if that is alright with the group." D-265.

189. Members of the Bexar County delegation met numerous times during the process. TrJ315 (Farias).

Ruth Jones McClendon (African American, Democrat) was the dean of the delegation. TrJ315-16. Villarreal oversaw laying the map out on RedAppl and presenting it to the delegation. TrJ316.

190. Villarreal began working on a plan for the delegation and sending draft plans to Interiano. He sent his first draft to Interiano on February 24. D-313. Villarreal continued sending draft delegation plans to Interiano throughout February and March.

191. Interiano met with the delegation and was also meeting with some representatives individually to work on their districts. Interiano worked individually with the Republican members of the delegation, Garza, Straus, and Larson. TrA53-54 (Interiano)

192. In early March, Interiano worked with Garza and Garza's staff to help design HD117. They would work in Interiano's office in Interiano's RedAppl account (strj), and he would send the plan to Garza's account. TrJ1548 (Interiano). Garza's personal participation was limited. TrJ1518 (Interiano). He instructed his staff to follow Villarreal's guidelines and create a district that would give him the highest possibility of being reelected. TrJ374 (Garza). Garza believed that 2012 would be a tougher election for him than 2010 had been. TrJ379. Garza and his staff looked at election and turnout data, and precinct returns for his 2010 race. TrJ362 (Garza). Garza and his staff were aware of which precincts gave him strong support and which had weak support. TrJ363 (Garza). Garza and his staff knew that he had performed better in the northern part of his district than the southern part in 2010, and had performed better outside Loop 410 than inside. TrJ377-78 (Garza). They also looked at precinct returns for other

races, including the Governor's race, the Attorney General's race, and some other statewide races going back to 2006. TrJ363, TrJ375 (Garza). Garza and his staff did an analysis of turnout district-wide. TrJ373 (Garza). He admitted that one of the metrics they looked at was "the turnout between Anglos and Hispanics and turnout generally." TrJ373 (Garza). In his deposition, Garza stated that rural Hispanic turnout tended to be low but tried to explain this statement at trial as being due to the fact that population numbers were lower in rural areas. TrJ374 (Garza).

193. In the benchmark, HD117 was in western Bexar County and did not extend all the way to the north of the County or very far south into the County. It included portions of northwest San Antonio and southwest San Antonio. Garza admitted at his deposition that he wanted to spin the district farther north because the area was more Anglo and more conservative, and they would tend to vote Republican. TrJ367-69 (Garza); PL-454 (Garza 10-19-11 depo. at 30, admitted during interim plan proceedings 11-3-11 Tr704).

194. Garza testified that because his district was overpopulated (by 52,723), he was going to have to give up population. TrJ378. He said that most of the Bexar County delegation was Democrats who wanted to remain in the City and were looking to pick up those areas, and he was defending some of the stronger areas within the City or within 1604. TrJ378, TrJ372 ("[M]ost of them were looking to gain population from me, so it was more of what I would be able to maintain in the district within the city.").

195. The initial draft that Garza's staff and Interiano came up with (garzH100) was less than 50% SSVR (total was 46.3%, non-suspense SSVR was 47.3%). PL-523; TrJ1547-49 (Interiano). The proposed district extended to the north outside the City of San Antonio, but still included parts of northwest San Antonio, and extended farther south than it had previously, with an appendage jutting into southwest San Antonio. The top northeast corner of the district was I-10 and Loop 1604, which includes suburban development in the City. TrJ1549 (Interiano). This proposed district was given to Villarreal to put in the delegation map as Garza's ideal district. TrJ381 (Garza). Therefore, Garza's ideal district was not completely rural, but contained portions of the City of San Antonio.

196. Around March 10, Villarreal put all the districts together in a map that showed areas of overlap and unclaimed areas. Then the delegation members went into a room and starting discussing who would get which areas. TrJ1519 (Interiano). Both Garza and Farias wanted an area in southwestern Bexar County that included the city of Somerset. PL-527 (plan strjH136). Garza's proposed district at that time did not include Whispering Winds; it remained in Farias's district HD118.

197. Farias's main concern was to keep the Harlandale School District in his district, HD118. He served on the Harlandale school board and lives in that district, and his children and grandchildren went to school there. TrJ316-17 (Farias). He also wanted to keep Somerset and Whispering Winds in South Bexar County because they were poor, neglected areas, and he wanted to continue to help them with their water

issues. Farias did not need these communities to get re-elected, but he was very engaged with those communities and was trying to provide support for them. TrJ317, TrJ325 (Farias).

198. Villarreal continued to work on delegation maps, and his maps included versions of HD117 with SSVR above 50%. Villarreal urged the delegation to be careful about VRA compliance, and was checking proposed districts for compliance. TrJ364-66 (Garza). Villarreal had concerns about the performance of HD117 and voiced them to Interiano. Interiano talked to the attorneys, and then informed Garza that his proposed district would not work. TrJ1521 (Interiano). Interiano explained to Garza that his district's SSVR had to stay above 50%. TrJ1521. Garza told Interiano to work with his staff to make changes.

199. Interiano and Garza's staff knew that Garza did not tend to win SSVR-majority precincts. On March 25, Adelina Bryant sent Interiano an email with an attachment called HD117 VTD Analysis. PL-1664. This was a racially polarized voting analysis of HD117 that focused on Garza's election. PL-1664; Quesada-240. A notation says, "Of the 27 VTD's won by Garza, 4 had a majority of SSRV. Of the 23 VTDs which are majority SSRV, Garza won 4."

200. Between March 23 and March 29, Interiano worked with Garza's staff, primarily his Chief of Staff Art Martinez, and with Lynlie Wallace, Rep. Larson's Chief of Staff, on HD117. TrJ388-89 (Garza); TrA53-54 (Interiano). Larson's district adjoined HD117 to the north. They ended up moving Garza's district farther south, farther into Farias's preferred areas, including Whispering Winds. TrJ1522, TrJ1554 (Interiano). This new southern portion of the district included

areas that Garza had not spent much time in. TrJ396 (Garza). Several precincts in heavily Hispanic and politically active South San Antonio ISD that had strongly preferred Garza's opponent in 2010 (Precincts 1025, 1040, 1044, and 1045) were moved out of HD117 and into HD118. TrJ399-403 (Garza); PL-1361.[5] The goal was to get the district to 50.1% SSVR, while also keeping the district as strong as possible for Garza's re-election. TrJ399 (Garza); TrJ1523 (Interiano).

201. Interiano acknowledged that they could have gone into inner city San Antonio and taken areas from other members to get the SSVR up above 50%, but he said they were trying to balance getting the SSVR up with keeping political numbers up, as well as the desire to stay outside the City of San Antonio and Loop 1604, so instead they went south into Farias's district. TrJ1524 (Interiano). Interiano said that Garza wanted to stay outside the City of San Antonio proper due to water issues, referring to issues surrounding the Bexar Met water district. TrJ1518, TrJ1526 (Interiano). Interiano's testimony that Garza wanted to stay outside the City and was concerned with water

---

[5] In the Task Force's Fifth Supplemental Exhibit List filed July 14 (docket no. 1154), exhibit PL-954 was listed but the description was blank. During trial on July 15, Nina Perales discussed this exhibit, calling it PL-954, with Rep. Garza. TrJ401-03. Defendants did not object. On the Amended Exhibit List filed July 19, PL-954 is listed as the Bexar County precinct returns. The State filed its objections to the Task Force exhibits on August 1 (docket no. 1194) but listed no objection for PL-954, noting that there was no exhibit description (based on the July 14 exhibit list). On October 2, the Task Force Plaintiffs moved to admit this same exhibit with the corrected exhibit number of PL-1361 (docket no. 1256) and the motion was granted by text order that same day. The exhibit was filed at docket no. 1257.

issues is not credible. Garza testified that he felt that the political issues surrounding Bexar Met were independent from redistricting, and he did not have any goals in redistricting relating to taking more or less of Bexar Met territory. TrJ405-07 (Garza). Garza did not know specifically which areas of HD117 included people who were taxpayers for Bexar Met. TrJ405, TrJ408 (Garza). Interiano's testimony that Garza wanted to stay outside City of San Antonio conflicts with Garza's testimony that he was defending some of the stronger areas within the City from other members of the delegation who wanted to take them from his district, and also conflicts with the fact that Garza's proposed ideal district included parts of the City. TrJ378 (Garza). Further, Interiano acknowledged that certain areas outside 1604 and west of I-10 that were included in Garza's "ideal" HD117 included quite a bit of suburban development and were not necessarily rural. TrJ1550-51 (Interiano); PL-991; PL-992.

202. Interiano said that, when he was working with Garza's staff drawing the district, he never had on racial shading or demographic shading at the block level, and there was no racial discussion. TrJ1599, TrA55 (Interiano). Interiano stated that SSVR is considered an election statistic, and they had it turned on, but not HVAP, BVAP, or census data. TrJ1599. Interiano testified that, in addition to SSVR, he monitored election performance. TrJ1551. He stated that he used SSVR instead of other metrics because all of the guidance (from DOJ, TLC) had been to use SSVR. TrJ1600. There could be a wide gap between HVAP and SSVR; members wanted to look at SSVR because of the gap and to see who actually turned out

in an election. *Id.* Interiano denied using turnout percentages when selecting areas for HD117 or using turnout data at all to draw districts. *Id.* Interiano described the process as: looking at political shading and SSVR in statistics, and adding and removing portions, looking to stay outside 1604 and the City of San Antonio; a lot of testing, going back and forth and seeing what happened to the numbers to keep above benchmark SSVR and as high Republican as they could. TrA54.

203. Between March 23 and March 29, the versions of HD117 that Interiano and Garza's staff worked on showed incremental increases in SSVR from 48% to 50%, while the electoral performance of Hispanic-preferred candidate Molina remained below 50%. Plans garzH106 and garzH107 have total and non-suspense SSVR of 48.6%, while Molina receives 47.3% of the vote. PL-533; PL-534. Plan garzH109 had total and non-suspense SSVR of 50.0%, and Molina received 48.7% of the vote. PL-535.

204. To increase SSVR but keep Republican numbers up (and therefore Hispanic-preferred candidate performance lower) as the map progressed, some higher turnout precincts in north San Antonio were taken out and more-Hispanic but lower turnout precincts in southern and southeastern Bexar County were added in. TrJ125 (Arrington); PL-523 (garzH100, Garza's ideal proposed district); PL-538 (hrc1H190, final version); PL-1361 (precinct turnout for Bexar County); PL-739; PL-740.

205. On March 29, Interiano saved a draft map from Villarreal that had an SSVR of 50.3% and Molina won with 50.3% of the vote. PL-536 (strjH205). Thus, although the difference between Villarreal's plan and

garzH109 is only .3% SSVR, the difference in performance for candidate Molina is 1.6%. The 2006 Molina race for Court of Criminal Appeals was one of the races included in the OAG 10 analysis provided to redistricters. TrA56 (Interiano).

206. On March 29, both Garza's account and Interiano's account included a draft HD117 with 50.0% SSVR (garzH109) (strjH206). In both of these plans, HD117 had 172,717 people and Molina gets 48.7% of the vote.

207. At some point, additional changes were made that reduced the total population of HD117 to 171,249 and raised the SSVR to 50.1%. After these changes, the election analysis shows that Molina gets 48.8% of the vote in the 2006 Court of Criminal Appeals race. The mapdrawer for HD117 would have been able to see that the SSVR for the district was 50.1% and election statistics, including that the vote for Chavez-Thompson was 40.6%. TrJ243 (Dyer). Later on March 29, Villarreal incorporated this new 50.1% SSVR version of HD117 into the delegation map and gave it to the HRC. PL-538 (hrc1H90).

208. In the Bexar County delegation, nine members voted for the delegation map submitted to the HRC, and Farias voted against it. Farias's objection was based on the removal of Somerset and Whispering Winds from his district. TrJ326 (Farias). The delegation plan was delivered to Solomons despite Farias's objection. TrJ316 (Farias); Tr1432 (Interiano).

209. Both Farias and Garza wanted the City of Somerset and Whispering Winds. Farias felt strongly about keeping those areas and helping them resolve

water and other issues. TrJ317-21 (Farias). Farias visited with Villarreal and Interiano about it. TrJ326. Farias asked for a meeting with the Speaker, and Interiano was there. After that meeting, the Speaker gave Interiano the direction to keep Garza's district in that area. TrJ1558, TrJ1595, TrJ1598 (Interiano). Thus, Speaker Straus resolved the dispute between Garza and Farias over who would get the Somerset and Whispering Winds areas. TrJ1558 (Interiano). Interiano said that Garza needed that rural population to keep Garza's district outside of 1604 and outside the City of San Antonio. TrJ1559 (Interiano) ("So we believe that in order to keep him outside of 1604 and outside of the city of San Antonio, we needed that rural population. It was, again, the balancing of the different priorities that were political performance, SSVR, as well as the geographic."). Again, for the reasons discussed previously, this explanation is not credible.

210. Garza believed that rural Hispanic turnout would be low. TrJ373-74 (Garza). He also thought Somerset Hispanic turnout would be low. TrJ403-04 (Garza). In addition, to the extent mapdrawers were looking at estimated turnout reports from the OAG, those reports showed both Anglo and Hispanic estimated turnout going down, but Hispanic turnout went down by more. US-3.

211. In Plan H283, HD117 has a very large gap between HCVAP and SSVR of 13.7 points, which is well beyond any gap in any other House district (it appears the next largest gap is in HD41, which has a 9.1 gap).

212. Farias testified that, toward the end of the process, Rep. McClendon called him and Garza to the

back of the room to negotiate about Somerset and Whispering Winds. Farias testified that Garza said, "Joe, all I want is more Mexicans in my district." TrJ335, TrJ347 (Farias). Farias did not know what Garza meant by that, but it upset him. TrJ335 (Farias). Garza denied making any comment about wanting or not wanting any kind of Mexican, but refused at trial to give an unqualified answer when asked if he made the statement. TrJ425-27 (Garza).

213. Farias attempted to work with Garza and his staff to find a solution where he could keep Whispering Winds and Somerset and both could be happy with the lines. TrJ326-27 (Farias). Garza would not move from 50.1% SSVR. The instruction Farias was given was that HD117 had to be 50% or more SSVR, and Garza wanted no more than 50.1%. TrJ329 (Farias). Garza rejected maps that had 50.3% and 50.4%. TrJ329. Farias offered to keep his areas of Whispering Winds and Somerset and let Garza keep his areas in South San Antonio ISD area, which is a politically active, high turnout, predominantly Hispanic area mostly inside Loop 410. TrJ330-31 (Farias). Garza did not want the South San Antonio ISD area back. TrJ332 (Farias). Farias testified that, if Garza had wanted more Hispanics, then South San Antonio ISD area would be good to have in his district, but everyone in politics in Bexar County knows that this area is very politically active and high turnout. TrJ352 (Farias). Eventually Farias gave up on Somerset and focused only on keeping Whispering Winds because of the Bexar Met issue. Garza still would not agree, and Farias would eventually propose a floor amendment to try to make the change. TrJ327 (Farias).

214. All three of Hanna's retrogression memos raised the same points about Bexar County:

> Bexar County's seven Hispanic districts may constitute one of the most challenging balances of population in order to avoid retrogression. In 2001, the state proposed eliminating one of these districts because of the loss of a district in the county but preclearance was denied for this proposal by DOJ. In its fix, the court chose to draw seven Hispanic districts each with an SSVR of 55%. In the decade since the court drew its plan, six of the districts have remained at the level of SSVR at which they were drawn, and one (District 117) has diminished to just above 50% SSVR. Bexar County as a whole has remained relatively constant in SSVR over the decade going from 42.4% to 43.1%. Despite this near constant level of SSVR, it is possible that Hispanic voters have become more dispersed across the county making Hispanic districts more difficult to draw. Five of the seven districts are short people necessitating a move of districts to the north and west. The proposed plan raises retrogression questions as to the significant declines in Districts 116 and 119. These declines seem inexplicable in light of the raises in the SSVR levels in adjacent Districts 118 and 125. The declines in SSVR in Districts 123 and 124 seem to be only of minor concern. The most prudent approach would be to eliminate the increases in SSVR in Districts 118 and 125, and restore as much of the

declines as possible starting with Districts 116 and 119.

215. Plan H113 was released on April 13, and no changes were made to HD117 after Plan H113.

216. Interiano knew from the OAG RPVA that performance for the Hispanic candidate of choice decreased in HD117 in Plan H153. TrA9-10 (Interiano). He acknowledged that there could have been drafts with 50.1% SSVR with higher performance for Hispanic candidates of choice. TrJ1631 (Interiano).

217. On April 27, during debate on the House floor, Rep. Menendez (Hispanic, Democrat) offered Amendment 1 (Plan H160), which changed some lines between his district and Rep. Castro's district (HD124 and HD125 in Bexar County) that involved no people and was agreed between them and was acceptable to the author. It was adopted. D-190 at 88-89, S729; D-13 at S130.

218. Rep. Farias put forth Amendment 2 (Plan H182) regarding his district and Rep. Garza's district in Bexar County (HD117 and HD118). D-13 at S130; D-190 at 90-91. His amendment would put parts of four precincts that were moved into Garza's district (Whispering Winds) back into Farias's district. D-13 at S130-31. Farias stated that these were poor, rural areas that had been his constituents that he would like back, and that the amendment would keep Garza's district at 50.1% minority, which was a "big concern" for Garza. Farias stated that Garza had stated to him that he would not oppose the amendment, but would live with the will of the House. *Id.* at S132-33. Rep. Aliseda asked how it would affect Republican performance, and Farias stated, "We didn't look at

republican numbers because the last conversation we had was that his big concern was that he did have a minority district, and he wanted to keep it without changing the numbers. So we kept it at 50.1 percent that he had. He said he would be happy with that." *Id.* at S132. Farias further stated that the areas in question (that Farias wanted) likely would not support Garza because Garza is a Republican and they were Democrat areas, but Garza was getting military precincts that have "some republican votes." *Id.* Farias was a third-term member, while Garza was a freshman, and having represented the area, Farias did not think those areas would vote for Garza. The amendment put Lackland Air Force Base back into HD117, and it is predominantly Anglo. TrJ346. The amendment split precincts 1033, 1035, 1037, and 1040. TrJ346-47 (Farias). The splits were made solely on the basis of race, to meet the 50.1% SSVR requirement. TrJ347 (Farias). Farias did not know if the changes would reflect an increase in Republican strength for HD117. TrJ347. Farias's amendment stayed within the required deviations. TrJ349 (Farias).

219. Solomons stated, "The proposed District 117 was drawn to bring together rural and suburban communities and interests in south and west Bexar County. The amendment as proposed creates a jagged and awkward line that divides these communities and creates an island along I-37 that connects to the west of the district by only a tiny strip of land. And a proposed map cleanly follows the proposed map as it exists today, follows the Medina River, a natural barrier that divides the rural and urban counties—communities in south Bexar County. The amendment

reduces the compactness of both 117 and 118. It increases number of split precincts in District 117 from one to seven and in District 118 from nine to fifteen, and increases the number of split VTD's in District 111 from one to seven and in District 118 from 10 to 15. It does have a negative impact on District 117, republican numbers. It is a district that—it goes from—let's see—pretty much—that's pretty much it. I guess the will of the House—I'm going to make a motion to table but it really will become a matter for the will of the house, I suppose, but I'm going to oppose it because of the reasons stated." D-13 at S133-34. Solomons testified that leaving it to the will of the House means you are trying to communicate to the House floor and other members that it is really up to them. TrJ1040. Solomons' comments on the amendment were given to him by staff to try to inform members about the specific effects of an amendment because redistricting bills cannot just be read. TrJ1042-44. In this case the comments were likely prepared by Interiano. TrJ1098 (Solomons); TrJ1599 (Interiano).

220. Farias tried to convince Garza to say he was okay with the amendment so they could move on without it coming to a vote on the House floor. TrJ328 (Farias). Garza had said he would leave it to the will of the House, which meant that he was releasing anybody that he has ties with to go ahead and vote how they want. TrJ332-33 (Farias). Farias told that to Solomons, but Garza never got up to say that; he stayed in his chair, and the amendment failed. TrJ333 (Farias). Farias testified that there was concern about split precincts but that was the only way to get to 50.1% SSVR. *Id.* They had tried to keep all the

precincts together because Farias realized how hard it is for representatives and for constituents to figure out where they vote when precincts are split. TrJ334 (Farias).

221. Solomons voted against the amendment and moved to table it. TrJ1040. Amendment No. 2 was tabled. The motion to table prevailed by (Record 568): 94 Yeas, 49 Nays, 5 Present, not voting. D-190 at 2294-95. Farias testified that Garza and Larson voted against his amendment, but the record vote indicates that only Garza voted to table the amendment, and all the other members of the San Antonio delegation (except Straus, who abstained) voted against the motion to table. TrJ350-51 (Garza).

222. Although Solomons objected to the Farias amendment because it split six precincts along the boundary of HD117 and HD118, Solomons did not have a problem with the 14 split precincts along the border of HD77 and HD78 in El Paso or those in HD41.

223. In H283, HCVAP for HD117 is 63.8% and SSVR is 50.1%. Garza testified that he viewed the increase in HCVAP from 58.8% to 63.8% as "an extreme positive." TrJ423 (Garza). With regard to the slight decrease in SSVR from the benchmark, Garza testified that he did not understand at the time that a decrease in SSVR indicated a decrease in the effectiveness of the Hispanic vote, and he still viewed the increase in HCVAP as a positive because they could go out and register those voters and have them be more active. TrJ432 (Garza). However, they did not do voter registration in 2012. *Id.*

224. Dr. Engstrom concluded that HD117 was not a Latino opportunity district in Plan H283. Engstrom

Corr. Rebuttal Report (docket no. 307-1) at 28. He considers Latinos to have a reasonable opportunity in a district when their preferred candidates win a majority of the votes cast in 7 general elections and 6 Democratic primary elections in the district more often than not, both in the general and primary elections. *Id.*

225. Dr. Engstrom found a high level of racial polarization in voting in Bexar County. Tr504. Engstrom (Joint Ex. 7) concluded that Latino voters in Bexar County are highly cohesive in support of Latino candidates with the Democratic Party nomination in general elections. Latino Republican Guzman (Supreme Court) was not supported by Latino voters, who provided her an estimated 16.3% of their votes based on bivariate analysis and 23.8% based on multivariate analysis. All Latino candidates in Democratic primaries also received strong support from Latino voters (85 to 93.2% bivariate and 83.7-89.2% multivariate). Latinos voting in the Republican primaries did support the Latino candidate running for re-election to the Railroad Commission in both analyses (80.7% bivariate and 63.3% in multivariate), but they did not support the Latino seeking the Republican nomination for Governor. Non-Latino voters were generally not supportive of Latino candidates. In general elections they did not share the candidate preferences of Latino voters (estimates of support range from 24 - 31.1% in the bivariate analysis). Multivariate analysis reveals that African Americans did support these Latino candidates, with support ranging from 70 to 81.4%. Other voters (mostly Anglos), however, supported these candidates at rates estimated to range from 8.2% to 21.9%. The only Latino Republican candidate received an

estimated 70.3% support from non-Latino voters in bivariate analysis, but again there was deep division between African-American and other/Anglo voters–estimated African-American support for her in a multivariate analysis is 14.2% while other voters is 84.9%. Non-Latinos provided a majority of their votes to two of the five Latino candidates that were preferred by Latino voters in the Democratic primaries. This was true of African Americans in only one of the Democratic primaries in the multivariate analysis, while other voters cast majorities of 54 to 60.2% in three. In the Republican primaries, non-Latino voters, both African-American and others, did not support either of the Latino candidates.

226. Engstrom concluded that, based on these results, the ultimately decisive general elections in Bexar County reveal Latinos to be very cohesive in their candidate preference for Latino candidates, and that preference is shared by African-American but not other voters. The analysis of the Democratic primary elections reveals that Latinos are likewise very cohesive in their preference for Latino candidates in these elections, but these preferences are not consistently shared by the rest of primary voters.

227. In Engstrom's corrected rebuttal report, he again concluded that Latino voters are highly cohesive in support of Latino candidates with the Democratic party nomination in the general election. Docket no. 307-1 at 9. Estimates of their support ranged from 96% to 91.8% in the bivariate analysis. None of these Latino candidates received a majority of support from non-Latino voters, with their estimated support ranging from 23.9% to 33.1%. *Id.* at 10. Multivariate analysis showed African-American support to range

from 51.2% to 81.4%, while other voters only supported them between 8.2% to 21.9%. All Latino candidates also received strong Latino support in the Democratic primaries (85.3% to 93.2% in the bivariate analysis). He concluded that the general elections revealed a high level of racially polarized voting, and that Latinos shared a strong preference for Latino Democratic candidates that was shared by African-Americans, but not other voters, whose support was never more than 22%. Latinos are also very cohesive in their support of Latino candidates in the Democratic primary, but these preferences were not shared by African-American voters or Anglo voters.

228. In Bexar County, 29.5% of Hispanics lack a high school education. Joint Expert Ex. E-1 (Chapa Report) Table 4. The per capita income for Hispanics was $15,526, compared to $34,401 for non-Hispanic Anglos. *Id.* Table 5.

229. Benchmark HD117 was a Latino opportunity district that elected John Garza, a Hispanic Republican, in 2010. Garza was not the Hispanic candidate of choice.

230. In Plan H283, Garza's district was not drawn by the Bexar County delegation but by Interiano and staffers from Garza's office and Anglo Republican Larson's office. Mapdrawers knew they had to keep HD117 above 50% SSVR based on the metrics they were using, so they kept HD117 at 50.1% SSVR and refused to go any higher. Garza and his staff knew that Garza did not perform well in SSVR-majority districts and wanted more Anglos in HD117 because they believed them to be conservatives who would vote Republican. To achieve the goal of 50.1% SSVR while at the same time protecting Garza, they removed

higher turnout, urban precincts and added rural precincts with low Hispanic turnout that had been in HD118. They created a district with the largest gap between HCVAP and SSVR by far (13.7 points). Interiano's explanations of drawing the district because Garza wanted a rural district and was concerned about Bexar Met issues are not credible. Garza had stated that he was defending some urban areas and his ideal district included urban areas, and he did not view Bexar Met as relevant to redistricting. Further, Garza admitted that they looked at turnout between Anglos and Hispanics and Garza knew that rural Hispanic turnout tended to be low. Even though Farias had represented the rural communities of Whispering Winds and Somerset, which had low Hispanic voter turnout, Garza refused Farias's attempts to return these areas to his district because Interiano and Garza knew that including other Hispanic urban areas instead would hurt Garza's election chances by including Hispanic areas with higher turnout.

Nueces County

231. In 2000, Nueces County was apportioned 2.2562 districts. D-212. Based on 2000 Census data, it had an HCVAP of 50.97%. D-180; D-230. In the benchmark, three districts—HD32, HD33, and HD34—were wholly or partly in Nueces County.

232. Benchmark HD32 consisted of the whole counties of San Patricio, Aransas, and Calhoun Counties, and 14% of Nueces County. The 14% of Nueces County (approximately 47,712 persons) was 59.1% Anglo, and HD32 was majority Anglo in terms of total population (52%) and VAP (56.8%). TrJ633 (Herrero); Red-100 Report. Benchmark HD32 was

represented by Gene Seaman (Republican), then Juan Garcia (Hispanic Democrat) (2006), then Todd Hunter (Anglo Republican). TrJ633 (Herrero). Hunter defeated Garcia in 2008 with 50.13% of the vote, and was re-elected in 2010 without an opponent in the general election. HD32 was 35.3% HCVAP using 2005-2009 ACS data and 36% HCVAP using 2008-2012 ACS data. Tr1497 (Interiano); PL-324; D-100 (Red-106 using 2005-2009 ACS); MALC-106.

233. HD33 and HD34 were entirely within Nueces County and were majority-Hispanic, majority-HCVAP, and majority-SSVR districts. Tr461 (Flores); D-100.

234. Benchmark HD33 was 60.4% HCVAP using 2005-2009 ACS data and 62.2% HCVAP using 2008-2012 ACS data. MALC-106; D-100. HD33 was completely within Corpus Christi and was 54.3% total SSVR/55.3% non-suspense SSVR. From 2004 to 2010, HD33 was represented by Hispanic Democrats and was a Latino opportunity district. Solomon Ortiz, Jr. defeated Republican challenger Raul Torres in 2008. In November 2010, however, Torres defeated Ortiz to represent HD33 by a vote of 52.51% (12,499 votes) to 47.49% (11,306 votes). Dr. Engstrom estimated that Ortiz received 92.3% of the Latino vote and 11% of the non-Latino vote. Tr510 (Engstrom). The turnout in HD33 was 45.08% Latino. Tr510 (Engstrom). Although he was Hispanic, Torres was not the Latino candidate of choice. Joint Expert Ex. E-2 (Kousser Report) at 45.

235. Benchmark HD34 was 58.2% HCVAP using 2005-2009 ACS data and 59.4% HCVAP using 2008-2012 ACS data. MALC-106; D-100. HD34 was 53.3% total SSVR/53.8% non-suspense SSVR. From 2004 to

2010, HD34 was represented by Abel Herrero, a Hispanic Democrat. Herrero defeated Anglo Republican challenger Connie Scott in 2008. In 2010, however, Scott defeated Herrero to represent HD34 by a vote of 53.96% (13,892 votes) to 46.04% (11,855 votes). TrJ660 (Herrero). Scott was the not the Latino candidate of choice. Herrero attributes his loss to reduced Latino voter turnout. TrJ630 (Herrero).

236. Benchmark HD33 and HD34 were Latino opportunity districts. However, in 2010, they did not elect the Latino candidate of choice. All three Nueces County House districts were represented by Republicans in the 82nd Legislature. Tr1497 (Interiano).

237. In both 2000 and 2010, Nueces County was majority Hispanic population and majority HCVAP. D-230 (estimated 50.97% in 2000); D-231 (estimated 55.87% in 2010). Between 2000 and 2010, the growth in Nueces County was attributable to Hispanics, as both African-American and Anglo population declined. MALC-148.

238. Nueces County growth did not keep pace with statewide growth. TrJ658 (Herrero); Tr1498 (Interiano). Based on 2010 census figures, Nueces County was apportioned 2.0295 districts. D-214. Accordingly, two districts could be contained wholly within Nueces County without exceeding 5% deviation.

239. In 2010, Rep. Herrero had discussions with Speaker Straus about Nueces County. Straus had mentioned to Herrero and Solomon Ortiz, Jr. that one of them was going to have to run for Congress because one of their seats was not going to be there for the next

session. TrJ645 (Herrero). He did not say the representative of HD32 might have to run for Congress. *Id.* MALC contends that it was therefore predetermined that they would lose a minority district.

240. According to 2005-2009 ACS data available to the Legislature, Nueces County was 54.61% HCVAP. D-51. According to 2008-2012 ACS data, Nueces County was 55.87% HCVAP. D-181.

241. On February 17, Hanna emailed Denise Davis with the subject "redist issues." D-192; US-102; Quesada-242. He wrote, "Corpus - Two seats only; three R's. And worse one of the seats will probably have to be more Hispanic than the other and probably elect a D. Not sure on this but preclearance likely an issue here."

242. On February 18, 2011 Denise Davis forwarded Hanna's email to Interiano. D-132. Interiano responded to Davis stating, "[Hanna] and I went through all of this yesterday afternoon and through some of the first things that we need to look at as soon as RedAppl is up and running. . . . The big issue with Corpus is that two of the current seats are 65% Hispanic (Scott, Torres), but the county as a whole is only 60%. Meaning that all of the Anglos live in Hunters [*sic*] district, so it really is going to be a tricky issue. This might be one of the things to mention to Nina Perales when we meet next week and see if she has any thoughts on whether there should be two 60% seats or one 65% and one 55%." D-132.

243. On March 21, the mapdrawers were still deciding what to do about Nueces County. *See* D-228

(Bruce email regarding issues to discuss and for which litigation team advice was needed).

244. On March 22, 2011, Rep. Hunter, Interiano, and Hanna met to discuss Nueces County issues. Afterwards, Hanna sent an email to Interiano (copying Archer) with the subject "Nueces County." D-136; US-110; US-156; Quesada-275. He wrote, "According to the 2010 census and the TLC database, Nueces County as a whole is 56.8 % HVAP and 49.6% Spanish surname for the 2010 general election. It is 60.6% total Hispanic pop. Accordingly you cannot have two wholly contained house districts in the county with 60% HVAP or 50% Spanish surname. It may be that the 60% total number got interpreted as HVAP but it wasn't. I am also not finding the election data to support the theory that Nueces County as a whole 'performs' for Hispanics. Thus I think it highly unlikely that you can ever get two performing districts for Hispanics no matter how you draw them, but I am not volunteering to test that theory." Archer responded, "Hispanic D's narrowly won most countywide elections (statewide, regional, and county offices) in 2008 general (like 51-49 size margins) and got trounced by larger margins in 2010 general (like 56-40, 55-41, 55-45)." US-156; Quesada-163. Archer then sent Interiano and Hanna election results from the 2006 general election for Court of Criminal Appeals (Keller (R) 50.59%, J.R. Molina (D) 49.41%), County Judge (Lloyd Neal (R) 54.55%, Larry Olivarez (D) 45.45%), and three district judge races (in two the Democrat Hispanic wins and in one the Democrat Hispanic loses). D-205; US-110; Quesada-252. Interiano responded, "Perfect. Thanks for all of this

stuff. I think I explained to [Hanna] my new strategy at the end." D-205; Quesada-402.

245. By April 1, the mapdrawers were working on a full state plan that had only two districts in Nueces County. Solomons made the decision to have only two districts, on advice of counsel. TrJ1560 (Interiano). Interiano talked about it with Hanna, and felt that any § 5 concerns caused by the loss of HD33 in Nueces County could be offset elsewhere in the plan without breaking the County Line Rule. *Id.* Interiano does not remember any specific § 2 discussions regarding Nueces County. *Id.*

246. On April 7, David Hanna wrote the first retrogression memo on the draft House plan. In this plan, there were two districts in Nueces County, one that was strongly Hispanic and one that was not. In his memo, Hanna wrote, "Nueces County may be the single most difficult retrogression issue to predict. While there are two 50% SSVR plus districts within the county currently that may constitute performing Hispanic districts, they are both significantly underpopulated and the remaining people in Nueces County are predominantly Anglo. The county line rule likely requires two districts to be wholly contained within Nueces County with no surplus coming out; however this would have to yield to the federal Voting Rights Act if it can be shown retrogression could be avoided by splitting the county. The approach taken in the proposed plan is to draw one clearly performing district and one that is not. Another approach is to split the Hispanic population exactly in half, resulting in two districts that are slightly at or under 50% SSVR, though neither will likely reliably perform as Hispanic districts of choice. A final approach is to see if by

splitting county lines in the area, the second Hispanic district could be preserved. This approach should be further investigated though it runs the risk of violating state law and requiring other county lines to be split, and should be pursued only if it would clearly contribute to total Hispanic voting strength statewide." Thus, Hanna suggested three options for Nueces County: (1) draw one performing Hispanic district and one not (as had been done in the draft map); (2) draw two equally Hispanic districts just below 50% SSVR, which may not perform reliably; or (3) determine whether the VRA required them to break the County Line Rule.

247. On April 12, David Hanna wrote his second retrogression memo concerning Plan H110, a nonpublic plan. US-339; D-327. Since no changes had been made to Nueces County, this memo raised the same concerns and gave the same three suggestions.

248. On April 13, Solomons issued a press release stating that the proposed House map (Plan H113) would be released that day. PL-205; D-9; D-206. The press release included the following "key points" for the map: (1) under "compliance with the Voting Rights Act," "In Nueces County, which has a 49% Spanish Surname Voter Registration and an apportionment of two districts, one new performing majority Hispanic district is created with a 63.7% [non-suspense] Spanish Surname Voter Registration, and (2) due to lack of growth in Nueces County, the County went from having 2+ districts to 2 districts, which led to the pairing of Republicans Torres/Scott." The "new performing majority Hispanic district" referred to HD34, which had been a majority-Hispanic

opportunity district in the benchmark but did not elect the Hispanic candidate of choice in 2010.

249. In Plan H113, Nueces County contained only two districts, HD32 and HD34. Total SSVR for HD32 was 34.9% and for HD34 was 62.9%. In addition, both districts were overpopulated, HD32 by 1.61% and HD34 by 1.34%.

250. At the April 15 HRC meeting, Luis Figueroa of MALDEF asserted that the loss of the Latino opportunity district HD33 in Nueces County raised retrogression concerns and concerns under § 2.

251. Hanna and Interiano felt that the loss of Latino opportunity district HD33 in Nueces County could be offset for § 5 compliance by creating a new Hispanic opportunity district in a different part of the State. TrJ1190-91, TrJ1210 (Hanna); TrJ1560 (Interiano). Downton also believed they could resolve any retrogression by finding a district elsewhere in the state that was below 50% SSVR and taking it above 50%. TrJ2096-97 (Downton). As a result, mapdrawers increased the SSVR of HD90 in Tarrant County and HD148 in Harris County above 50% in part to "offset" the loss of the Nueces County district. Both HD90 and HD148 were below 50% SSVR in the benchmark but were already performing for Latinos.

252. On April 17, Downton received a revised Nueces County map from Rep. Hunter. PL-538 (hrc1H288, hrc1H289). Downton did not work on the Nueces map at all. TrJ2014 (Downton). Hunter's version of Nueces County included an odd-shaped border between HD32 and HD34 in and around Corpus Christi.

253. On April 18, Rep. Torres sent an email to fellow members Hunter and Scott. D-142. He wrote, "I have made my decision regarding [Hunter's] request last Friday which was to leave his proposed map stand without challenge. I have decided that the good of the many outweigh the needs of just the one. Therefore, despite the fact that both I and HRT [Hispanic Republicans of Texas] have great concerns over the layout of the proposed redistricting map for Nueces County because of the perceived lower percentage of available Republican voters in the proposed district, I believe that it is my duty to do my part to keep us all on the same page of understanding. In addition, there are many other reasons such as: 1. All three of us made a commitment to each other at the beginning of session to work together. This is important. 2. Maintaining a positive working relationship between us three to ensure our success as a delegation. 3. Promoting party unity and long term political gains for Nueces County. 4. Maintaining a high degree of trust between us. I have informed HRT of my decision and have asked them to respect it. They are very disappointed with me right now. Todd, I am placing my trust in your word that you gave me last week to allow you time to see this process through and that you would find a way to fix the proposed district map to resolve my concerns." *Id.* Todd Hunter forwarded this email to Interiano. *Id.*

254. At the April 19 HRC meeting, Solomons offered statewide substitute Plan H134, and it was adopted. He then offered an amendment (Plan H135) to Plan H134, affecting Webb and Nueces Counties, and it was adopted (Nay: Veasey, all else present voting Aye). D-12. These amendments incorporated the plan received from Hunter with the odd-shaped

border and became the Nueces County configuration in Plan H153. In Plan H153, HD32 was .06% overpopulated and HD34 was 2.89% overpopulated (compared to Plan H113, where HD32 was 1.61% overpopulated and HD34 was 1.34% overpopulated). In Plan H153, HD34 was 61.1% total SSVR/61.7% non-suspense SSVR compared to 62.9%/63.7% SSVR in Plan H113. Therefore, the population of HD34 increased but its SSVR (and its HVAP) declined slightly.

255. Sometime around April 20, David Hanna wrote his third retrogression memo analyzing Plan H153. US-338; TrJ1161 (Hanna). Despite the changes to the map, this memo raised the same retrogression issue and made the same three suggestions regarding Nueces County. Hanna's concerns regarding Nueces County did not change across his three retrogression memos. TrJ1195 (Hanna).

256. On April 27, Plan H153 was brought to the House floor for debate/second reading. TrJ1947 (Bruce). With regard to Nueces County, Solomons said that the County Line Rule required two districts in Nueces County because it was at 2.03% of ideal district size, and the overall population in Nueces was 49% SSVR such that "it is impossible to draw two Hispanic majority seats within Nueces." D-13 at S120-21. He said that they decided to draw only one strongly Hispanic district (HD34) to allow the Hispanic community in Nueces County to elect a representative of their choice, and all three members of the Nueces County delegation (Hunter, Torres, and Scott) had agreed to that. *Id.* at S121. Rep. Martinez Fischer (Hispanic, Democrat) stated that, had they cut a county line, they could have had two minority

opportunity districts in Nueces County, and that Plan H153 had 17 cuts, such that one could have been in Nueces County. *Id.* Solomons responded that there was only one county cut in Plan H153 and that everything else was spillovers. *Id.* Solomons made clear throughout the debate that he would not break the County Line Rule to comply with the VRA.

257. Later in the debate, Martinez Fischer proposed Amendment 31 (Plan H198) regarding the Coastal Bend. D-13 at S219. Plan H198 had one district (HD34) wholly within Nueces County and four districts (HD 32, 33, 35, and 43) partly within Nueces County; it violated the County Line Rule. HD32 was an Anglo-majority CVAP district, and HD33 (58% HCVAP) and HD34 (63.8% HCVAP) were HCVAP-majority districts. D-104. Rep. Raymond complained that in Plan H153 minority voters in Nueces County were diluted and that the Nueces County configuration violated § 5. He stated that African-American neighborhoods had been placed into HD32, diluting their strength, and that Hispanic precincts were split into different districts, being diluted. D-13 at S219. He also noted that HD33, a Hispanic opportunity district, had been eliminated. Raymond advocated for Plan H198. Solomons stated, "This is a continuation of the dialogue on the Texas Constitution county line rule, and I'll move to table." The amendment was tabled. D-13 at S220.

258. Hunter laid out Amendment No. 14 (Plan H178) that he said moved a precinct and was approved by the committee. It was adopted. This amendment added the "toe" to the "boot" extension in Corpus Christi in HD34 by adding a precinct, and removed some population from the precinct below to keep a

pathway to the HD32 extension into Los Encinos. Los Encinos is a low-turnout minority area. TrJ647 (Herrero). The amendment also moved Precincts 57 and 68 (near the coast) from HD34 to HD32. This amendment created the final configuration of Nueces County that appeared in the enacted Plan H283.

259. Interiano testified that the Nueces County configuration in H283 was given to him by the Nueces County delegation (Hunter, Scott, and Torres). Tr1429-30 (Interiano). Hunter was the longest serving member of the Nueces County delegation in 2011, so he was the dean of the delegation. TrJ659 (Herrero). Hunter was the architect of the Nueces County map. Hunter depo. (docket no. 1092-3) at 53-54.

260. On April 27, Nina Perales of MALDEF wrote a letter to Solomons to provide information on Plan H153. PL-227; D-15. She wrote that Plan H153 was retrogressive and raised serious concerns under the VRA, including that Plan H153 eliminated HD33, a Latino opportunity district. She wrote, "Adding Latino voters to Districts 90 and 148 does raise the SSVR but does not create new Latino opportunity districts that can offset the loss of District 33." MALDEF and other minority members took the position that HD90 and HD148 could not offset the loss of an opportunity district because they were already performing Latino districts in the benchmark, such that increasing their SSVR above 50% did not create a new Latino opportunity district.

261. In Plan H283, Nueces County is divided into HD32 to the east and HD34 to the west, and HD33, which was a Latino opportunity district, is eliminated. TrJ646 (Herrero). HD33 was relocated to Rockwall County, and it is undisputed that it is not a Latino

opportunity district in Plan H283. Hunter, an Anglo Republican, was left as incumbent of HD32. Connie Scott and Raul Torres (the two junior members) were paired in Hispanic-majority district HD34. TrJ661 (Herrero).

262. HD32 (Hunter's district) is 563 persons (-34%) underpopulated and is 45.9% HVAP and 46% Anglo VAP. Red-100 Report. HD32 is 44.2% HCVAP using 2005-5009 ACS data (and 46.3% under 2008-2012 ACS) and 36.6% total SSVR/37.3% non-suspense SSVR. D-109. HD32 is not a Latino opportunity district.

263. HD34 is 5,512 persons (+3.29%) overpopulated and is 67.7% HVAP and 27.4% Anglo VAP. Red-100 Report. HD34 is 64.6% HCVAP using 2005-2009 ACS data (and 65.9% using 2008-2012 ACS data) and 60.1% total SSVR/60.8% non-suspense SSVR. MALC-105; D-109.

264. Although benchmark HD34 was underpopulated by 24,055, D-46, it is overpopulated in the enacted plan by 5,512, while HD32 is underpopulated by 563. Between PlanH113 and H153, HD34 went from 1.34% overpopulated to 2.89% overpopulated, and between Plan H153 and H283, HD34 went from 2.89% overpopulated to 3.29% overpopulated, while HD32 got less populated. The difference in population between HD32 and HD34 in Plan H283 is 6,075 persons. As a whole, Nueces County is overpopulated, and thus neither district was required to be underpopulated. No explanation is given for the population deviation.

265. HD34's total SSVR went from 53.3% in the benchmark to 60.1%. Benchmark HD34 was already

majority-Hispanic and was made more Hispanic. TrJ650 (Herrero). Herrero did not recall anyone at the field hearings suggesting that HD34 needed more Hispanic voters. *Id.*

266. Herrero describes the jagged boundary line between HD32 and HD34 as "unique," "just odd," and appearing "strategic." TrJ646. There are ten split precincts along the border of HD32 and HD34. US-387; US-375. The boot removed two potential Hispanic rivals (Torres and Ortiz) with legislative experience who might challenge the Anglo Hunter in HD32. TrJ647-49 (Herrero). The map also placed the minority community of Los Encinos into HD32, but it is a low-performing area with low turnout. TrJ647 (Herrero). In addition, the northern extension of HD32 is Hillcrest (Precincts 30 and 38), which is majority-African American surrounded by port areas, and is also lowperforming. TrJ648 (Herrero). Herrero opined that Hispanic voters were packed into HD34 unnecessarily and those left in HD32 were marginalized. TrJ650.

267. The Plan H283 districts for Nueces County are currently in effect in Plan H358. TrJ646 (Herrero). Herrero beat Scott in 2012 in the new HD34. TrJ661 (Herrero). Therefore it appears that HD34 as drawn is a performing Hispanic opportunity district.

268. Nueces County was over 50% HCVAP in 2000 and was over 50% HCVAP based on the 2005-2009 ACS data available to the Legislature. Interiano knew that Nueces County was majority HCVAP. Tr1463 (Interiano). However, Interiano used a standard of 50% SSVR (rather than 50% HCVAP) to determine whether § 2 required a Latino district, stating that it was based on guidance he had been given. TrA64-65,

TrA354 (Interiano). Interiano would have been aware that 50% HCVAP was the standard that had been set forth by many courts, including the Fifth Circuit. Archer and Hanna had also testified before the HRC on February 16 and March 1 and provided guidance that HCVAP was the relevant metric for § 2. Interiano testified that the intent behind the chosen configuration was to ensure that one of the two districts was an HCVAP-majority district, Tr1498 (Interiano), but this explanation is not credible given his statement that they were focusing on SSVR, and if they had been focusing on HCVAP, both districts could have been drawn as HCVAP-majority districts since the HCVAP of the county was over 50%. In addition, Interiano testified that they never looked at whether they could draw two HCVAP-majority districts in Nueces County. TrA65. There is no evidence that they could not do so. Nor did they ever do an exogenous election analysis on a draft two-district plan with HCVAP majority districts. *Id.*

269. Of the three options noted by Hanna for Nueces County (draw one clearly performing Hispanic district and one not performing district, split the Hispanic population exactly in half to create two districts slightly under 50% SSVR, or consider breaking the County Line Rule to preserve the second Latino opportunity district), the Legislature chose the first option and drew two districts in Nueces County, one more Hispanic and one less Hispanic. To support their choice, mapdrawers cited the fact that because Nueces County as a whole had SSVR below 50%, if they tried to draw two districts at 49.5% SSVR, they would be dropping two below a majority of SSVR and they were worried they would not perform for Latinos.

TrA50 (Interiano). However, they were more focused on the number of 50% SSVR and whether they were "performing" for § 5 purposes than whether the districts would actually provide an opportunity for Latinos to elect or whether they were required by § 2. TrA64 (Interiano). Two districts slightly below 50% SSVR would likely have been above 50% HCVAP. There is no indication that they ever tried to draw two districts that were equally Hispanic or measured their election performance. Further, although they were concerned about dropping below 50% SSVR for retrogression purposes, they did not look at whether they could draw two 50% HCVAP districts, which could have been required by § 2. Interiano did not recall talking to Hanna about whether § 2 would require keeping two Latino opportunity districts in Nueces County. TrA1560 (Interiano). They also refused the third option mentioned by Hanna, which was to determine whether the County Line Rule should yield to the VRA because Solomons had foreclosed that option. By choosing to draw only one strong Hispanic district, they protected Anglo Republican Todd Hunter, whereas drawing two HCVAP-majority districts or two more equal SSVR districts slightly below 50% SSVR would create two districts that might not perform for Republicans.

270. Even following their 50% SSVR requirement, mapdrawers could have drawn two SSVRmajority Latino opportunity districts if they disregarded the County Line Rule. TrA50 (Interiano). There were proposals that preserved the existing two Latino opportunity districts wholly within Nueces County and then spilled additional population out of the County. TrJ1560 (Interiano). These were not

considered because Solomons refused to violate the County Line Rule to comply with the VRA. *Id.* Interiano testified that no proposed plan created two Nueces County districts that could elect without violating the County Line Rule. Tr1449. The Court has not located any proposed plan in the record with two equal SSVR districts or two HCVAP-majority districts in Nueces County that does not break the County Line Rule (Plan H130, Plan H212, Plan H214, Plan H226, and Plan H232 each have one district around 70% HVAP and one around 43% HVAP).

271. The Latino Task Force offers demonstration Plan H292 with two Hispanic, HCVAP-majority districts in Nueces County. Tr461 (Flores); PL-326; Joint Map Ex. J-37; D-111. HD30 is 23.6% HCVAP, HD33 is 57.4% HCVAP, and HD34 is 57.1% HCVAP. PL-326. HD33 and HD34 are wholly within Nueces County, and a portion of HD30 is in Nueces County. This plan breaks the County Line Rule. PL-326 (docket no. 325-4 at 4); PL-341 (map).

272. MALC offers Plan H201, which preserves the existing two majority-HCVAP districts (HD33 and HD34) in Nueces County and spills over additional population to a third district (HD32). In H201, 6% of Nueces County (mostly Anglo) is put into HD32. This plan breaks the County Line Rule.

273. MALC also offers Plan H205, which has one HCVAP-majority (63.8%) district (HD34) wholly contained within Nueces County and the rest of Nueces County attached to four additional districts (HD32, 33, 35, and 43), all of which are HCVAP-majority districts except HD32. Joint Map Ex. J-26; D-108. This plan breaks the County Line Rule.

274. MALC's lower-deviation Plan H295 has one HCVAP-majority district (HD33) wholly contained within Nueces County and the additional population is joined with two different districts (HD32 and HD34), one of which is a Hispanic-majority district. It also breaks the County Line Rule.

275. MALC has offered demonstration Plan H329 and Plan H373, which have the same Nueces County configuration. MALC-107, MALC-110. In both plans, HD34 is wholly within Nueces County, while part of Nueces County is joined with Kleberg County in HD32, and part of Nueces County is joined with counties to the north in HD30. MALC-108. HD32 and HD34 are HCVAPmajority districts. MALC-109. H329 and H373 split only Nueces County, but split it two ways. H373 is an eight-district plan that could be plugged into H309 or H358.

276. Dr. Engstrom testified that the bivariate analysis of statewide elections from 2006 to 2010 revealed racially polarized voting in both general and primary elections in Nueces County. Tr503; Engstrom Rebuttal Report (docket no. 307-1) at 7/Table 2.

277. In his original report (Joint Expert Ex. E-7), Dr. Engstrom found that Latinos are highly cohesive in support of Latino candidates with the Democratic party nomination in general elections—all five got strong support (all >90% bivariate). The only La[illegible]no Republican, Guzman, was not supported. Further, all Latino candidates in Democratic primaries received strong Latino support (78.4% -95% bivariate). Latinos voting in Republican primaries did support the Latino running for Railroad Commissioner, but not for Governor. Non-Latino voters provided little support to any of the five Latino candidates favored by Latino

voters in general elections, according to the bivariate analysis (11.2% - 17.6% support). They did support the only Republican candidate that was a Latino with an estimated 78%. They did not support any of the Latinos seeking nominations in the Democratic primaries and did not favor either Latino candidate in the Republican primaries. Engstrom concluded that Latinos in Nueces County are very cohesive in their candidate preferences for Latino candidates, in both general elections and Democratic primaries, but their preferences were not shared by non-Latino voters in any elections analyzed.

278. In his corrected rebuttal report (docket no. 307-1), Dr. Engstrom found racially polarized voting in the HD33 2010 general election. Latino support for incumbent Solomon Ortiz, Jr. was estimated to be 92.3%, while non-Latinos gave him only 11% support. SSVR turnout was estimated to be 45.08%, and Ortiz received 47.49% of the vote.

279. Dr. Brischetto's EI supplemental analysis of 2012 elections showed that 88.9% of non-Latino voters supported Scott and 4.45% of Latino voters supported Scott. TrJ938 (Brischetto). About 11.09% of non-Latino voters supported Herrero and about 95.55% of Latinos supported Herrero. This showed a high degree of racially polarized voting between Latinos and non-Latinos. TrJ938 (Brischetto). Brischetto found this pattern of polarization in all ten general elections that he analyzed in Nueces County. He characterized it as extreme. TrJ992. Brischetto found it difficult to measure racially polarized voting in the Republican primaries because there were so few Latinos participating. TrJ939. Nevertheless, in three of five races he could "say with some confidence that there is

racial bloc voting." TrJ940, TrJ942. He also found good evidence of racially polarized voting in the Democratic primary. TrJ944. Partisanship is not a factor in the primary elections. TrJ943.

280. Dr. Brischetto found that Latinos had a high level of cohesion. TrJ969 (Brischetto). He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.*

281. Dr. Kousser also found that contests in HD33 between 2002 and 2010 were "starkly racially polarized," with Latino voters overwhelmingly supporting the Democratic candidates. Joint Expert Ex. E-2 (Kousser Report) at 87, Tables 12-14.

282. Dr. Robert Bezdek stated in his declaration that he worked as a political consultant for a Latino candidate for mayor who faced an Anglo opponent in the runoff election, and through his work on this campaign he saw firsthand the political cohesion of the Latino community in Nueces County. PL-412. He stated that much of the support for Latino candidates comes from the predominantly Latino West Side, and much of the support for Anglo candidates comes from predominantly Anglo neighborhoods. PL-412.

283. Defendants dispute the existence of racially polarized voting in Nueces County, specifically the requirement that "the White majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate" because minority-preferred candidates have won elections in Nueces County. At Defendants' request, the Court has taken judicial

notice of the election results in docket no. 1169, set forth in the table below. TrJ2161.

TABLE 1: 2012 General Election Results in Nueces County

Year	County	Election	Results in County
2012	Nueces	General Election, US President (Brischetto, Feb. 2014 at 21). Exhibit A at 1	Romney/Ryan (R)
2012	Nueces	General Election, US Senator (Brischetto, Feb. 2014 at 21-22). Exhibit A at 1.	Cruz (R)
2012	Nueces	General Election, US Representative, Dist. 27 (Brischetto, Feb. 2014 at 22). Exhibit A at 1-2.	Farenthold (R)
2012	Nueces	General Election, State Representative Dist. 34 (Brischetto, Feb. 2014 at 22). Exhibit A at 4	Herrero (D)
2012	Nueces	General Election, SBOE Dist. 2 (Brischetto, Feb. 2014 at 22). Exhibit A at 3.	Cortez, Jr. (D)
2012	Nueces	General Election, Justice, 13th Ct. Appeals, Place 2 (Brischetto, Feb. 2014 at 22). Exhibit A at 4.	Longoria (D)
2012	Nueces	General Election, Justice, 13th Ct. Appeals, Place 4 (Brischetto, Feb. 2014 at 22). Exhibit A at 4.	Rodriguez (D)
2012	Nueces	General Election, Justice, 13th Ct. Appeals, Place 5 (Brischetto, Feb. 2014 at 22). Exhibit A at 4	Benavides (D)
2012	Nueces	General Election, District Judge, 214th Jud. Dist. (Brischetto, Feb. 2014 at 23). Ex. A at 5	Longoria (D)
2012	Nueces	General Election, District Judge, 347 Jud. Dist. (Brischetto, Feb. 2014 at 23). Exhibit A at 5.	Medary (R)

284. Defendants note that in the nine elections for Texas House Representative in Nueces County (districts 32, 33, and 34) studied by Dr. Brischetto in his supplemental report, the minority-preferred candidate won the election six out of nine times. TrJ993-94 (Brischetto); MALC-166 Table 1. Dr. Brischetto explained that the minority candidate does win when the district is over 66% minority. TrJ996. In districts that were less than 50% minority, Anglo bloc voting defeated the minority-preferred candidate all but one time. *Id.*

285. There have been a significant number of Latinos in elected office in Nueces County. TrJ665 (Herrero). Three of eight Corpus Christi council members are Hispanic, as are the county attorney, Nueces County district clerk, and three of eight district court judges. *Id.*

286. In Nueces County, the mean family income and the mean household income for Anglos is almost twice that of African Americans and Hispanics. MALC-149. Hispanics and African Americans are several times more likely to rely on food stamps than Anglos. *Id.* The per capita income for Anglos far exceeds that of Hispanics and African Americans. *Id.*; Joint Expert Ex. E-1 (Chapa Report) Table 5. More than 86% of the Nueces County functionally illiterate persons over 25 are Hispanic. MALC-150. 16.3% of Hispanics over the age of 25 are functionally illiterate, compared to 2.6% of Anglos. MALC-150. Hispanics lag behind Anglos in high school graduation rates. *Id.* (stating that almost one third of Hispanics over the age of 25 are not high school graduates, compared to 8.3% of Anglos); *see also* Joint Expert Ex. E-1 (Chapa Report) Table 4 (noting that 21.3% of Hispanics in

Nueces County have less than a high school education). More Anglos have graduate or professional degrees than do Hispanics. MALC-150; Joint Expert Ex. E-1 (Chapa Report) Table 4.

287. Rep. Lozano was elected to HD43, which included Kleberg County directly to the south of Nueces County, in 2010 as a Hispanic Democrat (he ran again in 2012 as a Republican). TrJ1781-82 (Lozano). Lozano testified that nobody in his region wanted Kleberg County to be paired in a district with Nueces County and that the prior representative had fought against such a pairing in the 2000 redistricting cycle. TrJ1792. Lozano did not feel that MALC was there for him, because he felt some of their proposed maps paired Kleberg and Nueces against his wishes or butchered the region without consulting the members. TrJ1791-1811 (Lozano).

288. Although Nueces County was less than 50% SSVR in 2010, it was majority HCVAP and had been since at least 2000. Mapdrawers were aware that it was majority HCVAP. Because mapdrawers only focused on a threshold of 50% SSVR, they failed to look at whether two majority-HCVAP districts could have been drawn wholly within Nueces County with no additional districts coming into Nueces County. However, no Plaintiffs have presented such a map. Plaintiffs did present maps that maintained two HCVAP-majority districts in Nueces County, but they had more than two districts in Nueces County and thus broke the County Line Rule.

289. Of the two districts in Nueces County, HD34 (the minority district) is overpopulated in the enacted plan by 5,512 persons, while HD32 is underpopulated by 563 persons. The difference in population between

HD32 and HD34 in Plan H283 is 6,075 persons. As a whole, Nueces County is overpopulated and thus neither district was required to be underpopulated. No justification is given for the population deviation.

290. Plan H283 eliminates Latino opportunity district HD33, and mapdrawers refused to break the County Line Rule to maintain a second Latino opportunity district in Nueces County. Although mapdrawers assert that they chose to draw one strong performing Hispanic district and one non-Hispanic district in order to comply with the VRA, there is no indication that they needed to make HD34 as Hispanic as they did, and by doing so they protected Anglo Republican incumbent Hunter. Mapdrawers also did not thoroughly explore whether two districts slightly under 50% SSVR or two HCVAP-majority districts could or should have been drawn.

HD35

291. In 2001, the DOJ objected to the LRB's House plan in part based on its configuration of HD35. D-326; D-327; PL-225. The DOJ noted that the new district was created from existing HD31 and HD44 and paired an Anglo and a Hispanic incumbent. The Hispanic incumbent represented a district with 55.6% SSVR, and the new HD35 dropped the SSVR to 50.2%; HVAP also dropped from 57.8% to 52.1%. In addition, over half of the configuration of the new HD35 came from the Anglo incumbent's former district. The DOJ therefore concluded that Hispanic voters would lose their opportunity to elect their candidate of choice in HD35 and that the district "as drawn [would] preclude Hispanic voters from electing their candidates of choice." D-326; PL-225. This district was remedied in 2001, when the court reconfigured it and drew it with

51.5% SSVR. *Balderas v. Texas*, No. 6:01-CV-158, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), *summarily aff'd*, 536 U.S. 919 (2002).

292. In 2002, Democrat Gabi Canales won the district. In 2004, Democrat Yvonne Gonzalez Toureilles defeated Republican candidate Eric Opiela, and she won again in 2006. She was reelected without an opponent in the general election in 2008. In 2010, she was defeated by Republican Jose Aliseda 52.81% to 47.19%. Aliseda was not the Hispanic candidate of choice. Joint Expert Ex. E-5 (Martin Report) at 13; Martin depo. (Joint Ex. J-48) at 94; Joint Expert Ex. E-2 (Kousser Report) at 46; US-351 (Handley Report) at 5, 34.

293. In the benchmark Plan H100, HD35 was located in South Texas and was made up of Atascosa, McMullen, Live Oak, Jim Wells, Karnes, Goliad, and Bee Counties.

294. Benchmark HD35 was 15,755 people underpopulated. Red-202 Report. Hispanics were 60.6% of the total population; Anglos were 34.8% of the total population. HVAP was 56.4% and Anglo VAP was 38.2%. Total SSVR was 55.4%; non-suspense SSVR was 55.3%. HCVAP was 54.6%. Red-106 Report.

295. Benchmark HD35 was a Latino opportunity district. TrJ119, TrJ134 (Arrington). Benchmark HD35 had an exogenous effectiveness index of 40% (2/5) and an endogenous effectiveness index of 80% (as noted, it elected the Hispanic preferred candidate in 2002, 2004, 2006, and 2008, but not in 2010, when Aliseda was elected). TrJ34 (Arrington); Joint Expert Ex. E-5 (Martin Report) at 13; US-351 (Handley

report) at 5; PL-290 (Red-225 Report); US-363 at 170 (Red-225 Report).

296. Interiano asked intern Elizabeth Coburn to work on HD35. TrA48-49 (Interiano); TrJ1924 (Bruce); D-370 (April 11, 2011 email from Coburn to Interiano saying she has "done the Aliseda district numbers"). Therefore, Interiano was responsible for the configuration of HD35. Downton did not work on HD35. TrJ2046 (Downton).

297. Aliseda signed off on a version of his district that was created by Coburn and Interiano on April 4. D-229 at 4.

298. In Plan H113 (Solomons' first public plan) released on April 13, HD35 included La Salle, Atascosa, McMullen, Duval, Live Oak, Bee, and San Patricio Counties. Thus, it maintained Atascosa, McMullen, Live Oak, and Bee Counties, lost Jim Wells, Karnes, and Goliad Counties, and added La Salle, Duval and San Patricio Counties. The configuration of HD35 did not change between Plan H113 and Plan H283.

299. Hanna's three retrogression memos written between April 7 and April 20 all said the same thing about HD35. He noted that as drawn in 2001 the district had 51.5% SSVR, that benchmark HD35 had 55.4% SSVR, and that the proposed district had 52.7% SSVR. D-122; D-327; D-338. He wrote, "This district drew an objection from DOJ for having its SSVR lowered from 55.6% to 50.2% and pairing an Anglo and Hispanic rep. in a district DOJ concluded favored the Anglo. The court remedy only increased the SSVR to 51.5 but drew the district as an open district that a Hispanic candidate could win. The proposed plan

lowers the SSVR 2.5 points but has it higher than the court plan 10 years ago. Further election analysis should be performed on the district to measure the performance of the existing and proposed districts."

300. Interiano knew from the OAG RPVA that performance for the Hispanic candidate of choice decreased in HD35. TrA9-10 (Interiano). No changes were made to the map.

301. At the April 15 HRC meeting, Luis Figueroa offered Plan H115, which attempted to maintain HD35 as a Latino opportunity district. D-595 at 64-65. In Plan H115, the total SSVR of HD35 was 58.2% (non-suspense SSVR was 58.3%). HD35 shifted east and broke the County Line Rule.

302. At the April 27 floor debate, Rep. T. King (Anglo, Democrat) proposed Amendment No. 16 (Plan H161 as amended by Plan H242) that affected La Salle County and Jim Hogg County. D-13 at S179. The amendment would have moved La Salle County out of Aliseda's district, HD35, and into King's district, HD80 (where it had been in the benchmark), and moved Jim Hogg County into HD35 from HD80—basically a county swap. King said it would look better and make his district easier to travel, with negligible effects on electoral numbers. *Id.* at S180. King said it was only a .3% decrease in the 2008 Obama election (though later he said it might be .5% and Rep. Aliseda argued it had a more significant effect down ballot). Aliseda stated that he was not happy with the amendment because he was a freshman who would likely draw an opponent and it would reduce his Republican numbers. *Id.* Aliseda said he wanted to keep La Salle County to respect the community of interest of the Eagle Ford Shale, and King responded

that the Eagle Ford Shale was also in his HD80. *Id.* at S181. When Rep. Villarreal asked how the amendment would change his district, Aliseda said it reduced his HVAP but increased his SSVR "a little bit more." *Id.* at S183. Rep. Villarreal responded that SSVR is the relevant population (not HVAP) to look at if you want to get a sense of ability to elect. *Id.* Aliseda said he was not fighting the amendment because it increased the SSVR in the district. *Id.* Villarreal argued that SSVR in HD35 had dropped, and the amendment would bring it up, and that the amendment decreased the Republican numbers because of the increase in SSVR. *Id.* When Villarreal said that Aliseda seemed to be opposed to King's attempt to restore some of the decrease in SSVR, Aliseda said he did not oppose the increase in SSVR but was opposed to "the fact that it changes my district into a more democrat district." *Id.* at S184. Aliseda also said the increase in SSVR from the amendment was less than .02%. *Id.* Aliseda said the district as drawn was better for him than the district proposed by King's amendment. *Id.* at S185. Aliseda moved to table. King asserted that the amendment kept constituents that wanted to stay in his district, respected communities of interest, looked cleaner, and had a minimal effect on HVAP. *Id.* King argued that it should not be a Republican or Democrat issue but what was best for that area of Texas. Solomons left it to the will of the House, and it was tabled. *Id.* at S186.

303. Also on April 27, Rep. Coleman offered Plan H232, a statewide amendment to Plan H153. He stated that Plan H232 strengthened existing Latino opportunity district HD35, in contrast to the way Plan H153 treated it. D-13 at S247. His written comments,

which were placed in the record, stated that benchmark HD35 was only 56.4% HVAP and had not consistently elected the Hispanic candidate of choice. They stated that Plan H153 diluted HD35's HVAP by 1.5%, but Plan H232 would increase its HVAP to 63.9% while preserving all other Latino districts in the region (there are 12 HCVAP-majority districts in South Texas). *Id.* at S248. The comments stated that HD35 was weak because it had failed to elect a Latino candidate of choice in the recent election or would experience retrogression under Plan H153, and Plan H232 would make it more likely that it would perform. *Id.* at S249. This amendment was tabled.

304. From Plan H100 to Plan H283, HD35 lost Karnes, Goliad, and Jim Wells Counties, and gained La Salle, Duval, and San Patricio Counties. San Patricio County, which was added, was a large county of about 68,000 that was only 48.5% HCVAP using 2005-2009 ACS data, and Jim Wells County, which was removed and had about 40,000 people, was 74.22% HCVAP. D-51.

305. In Plan H283, Hispanics are 58.9% of the total population of HD35 (a decrease from 60.6%). HVAP is 54.9% (a decrease from 56.4%) and Anglo VAP is 40.6% (an increase from 38.2%). Total SSVR is 52.7% (a decrease from 55.4%) and non-suspense SSVR is 53.4% (a decrease from 55.3%). HCVAP is 52.5% (a decrease from 54.6%). Therefore, all Hispanic population metrics were decreased from the benchmark.

306. HD35 in Plan H283 is less effective for minority voters. The exogenous effectiveness index shows a reduction from 40% to 20%. TrJ134-35 (Arrington); *see also* US-351 (Handley Report) at 5, 11.

Dr. Arrington testified that although HD35 had been an effective district in the benchmark, the new district, at 20%, was no longer effective. TrJ135 (Arrington).

307. Dr. Engstrom found that HD35 did not provide a reasonable opportunity for Latinos, and he considered Latinos "to have a reasonable opportunity in a district when their preferred candidates win a majority of the votes cast in [7 general and 6 Democrat primary elections with Latino candidates] in the districts more often than not." Engstrom Corr. Rebuttal Report (docket no. 307-1) at 28.

308. In his report, Dr. Alford acknowledges that the Hispanic metrics have been reduced, but notes that Hispanics remain the majority in both HCVAP and SSVR. In his election analysis (Table 2), he notes that in benchmark HD35, Democrats win 28 of 48 statewide elections (58%) while in Plan H283 they win 23 of 48% (48%). US-350 at 5 & Table 2.

309. Martin opined that mapdrawers retrogressed HD35 via a reduction in HVAP from 56.4% to 54.9%, packed neighboring HD43 (the HVAP of HD43 in Plan H283 is 76.5%), and added San Patricio County to HD35 to improve the electoral chances of Republican incumbent Aliseda. Martin further opined that this retrogression of Hispanic population in HD35 was not necessary to meet any other redistricting principles. He noted that alternative Plan H232 created HD35 with an HVAP of 63.9%, while preserving the other Latino districts in the region and complying with the County Line Rule. Joint Expert Ex. E-5 (Martin Report) at 13-14.

310. In proposed Fact Finding 405, DOJ asserts that "[a]lthough there is an increase in overall turnout

among both Anglo and Hispanic voters in HD35, the Anglo voter turnout is significantly greater than the Hispanic voter turnout, reducing the effective share of Hispanic voters in the electorate," citing US-3 (the OAG RPVA) at 103, 105, 127, 129. However, a comparison of estimated Anglo and Hispanic turnout and of estimated distribution of votes of Anglos and Hispanics in various election contests in this exhibit actually shows that the "estimated turnout % for Anglo" decreased from Plan H100 to Plan H283, while "estimated turnout % for Hispanic" increased. In addition, the "percent Anglo estimated distribution of votes" decreased from Plan H100 to Plan H283, while the "percent Hispanic estimated distribution of votes" increased. Thus, this exhibit does not support DOJ's assertion, and in fact supports the opposite conclusion; if anything, mapdrawers looking at the OAG RPVA reports would have believed that Hispanic turnout was increased in comparison to Anglo turnout. Further, the Court notes that mapdrawers were limited in their ability to manipulate turnout in drawing HD35 because the district is composed of whole counties.

311. Benchmark HD35 was a performing Latino opportunity district but elected Republican Aliseda in 2010, who was not the Latino-preferred candidate.

312. In Plan H283, all the Hispanic population metrics were decreased slightly from the benchmark, but HCVAP and SSVR remained above 50%.

313. Benchmark HD35 scored an 80% on the endogenous election index and a 40% on the exogenous election index. The exogenous election index shows performance of HD35 in Plan H283 to be 20%. However, HD35 performance increased from 2/5 to 3/4

in the general elections under Dr. Engstrom's election index.

314. There is no evidence that mapdrawers manipulated Hispanic turnout in drawing the district.

Rio Grande Valley and HD41

315. In Plan H100, there were four districts wholly contained in Hidalgo County and no surplus population. All four districts were Latino opportunity districts. HD36 (Muñoz) was 83.8% HCVAP; HD39 (Martinez) was 79.1% HCVAP; HD40 (Peña) was 90.2% HCVAP; HD41 (V. Gonzales) was 77.5% HCVAP.

316. In Plan H100, HD40 had an HVAP of 93.5%, Anglo VAP of 5.1%, and total SSVR of 86.5%. The incumbent was Aaron Peña.

317. In Plan H100, HD41 had an HVAP of 81.8%, Anglo VAP of 14.8%, and total SSVR of 68.7%. Red-202 Report. This district had the highest Anglo VAP of the four Hidalgo County districts. Red-202 Report (showing HD36 had 9.8% Anglo VAP; HD39 had 11.2% Anglo VAP; HD40 had 5.1% Anglo VAP). The incumbent was Veronica Gonzales.

318. Hidalgo county grew more than the statewide growth rate, and all the Hidalgo County districts were overpopulated. D-43, D-46.

319. In 2010, all four representatives of Hidalgo County districts were elected as Democrats, but shortly after the 2010 election, Aaron Peña switched parties and became a Republican. TrA114 (Peña). Therefore, at the time of redistricting, there were three Hispanic Democrat incumbents and one Hispanic Republican incumbent in Hidalgo County.

320. Between Plan H100 and Plan H283, HD40 and HD41 were switched, so that Peña would be the incumbent in HD41, and Gonzales would be the incumbent in HD40.

321. In Plan H283, there are four districts wholly contained in Hidalgo County, and the surplus is joined into HD31 (represented by Rep. Guillen, a Hispanic Democrat), which includes Starr and Zapata Counties to the west. HD31 was a Latino opportunity district in the benchmark and remains one in Plan H283. In the benchmark, Rep. Guillen did not represent any part of Hidalgo County. TrJ525 (Longoria).

322. In Plan H283, HD36 (Muñoz) is 88.7% HCVAP; HD39 (Martinez) is 82.4% HCVAP; HD40 (Gonzales) is 89% HCVAP, and HD41 (Peña) is 72.1% HCVAP.

323. In Plan H283, HD41 (Peña's new district) has an HVAP of 76.2% (a drop of 5.6%), an Anglo VAP of 19.7% (an increase of 4.9%), and total SSVR of 63% (a drop of 5.7%). Red-202 Report. It has an HCVAP of 72.1% (a drop of 5.4%). Red-109 Report (2005-2009 ACS).

324. In Plan H283, the total SSVR of HD41 is 63% compared to 85.8% in HD40, 82.2% in HD39, 85.1% in HD36, and 90.8% in HD31. Red-202; Red-109.

325. In both Plan H100 and Plan H283, Cameron County has two districts wholly contained within it (HD37 and HD38) and surplus population is joined to the north in HD43. HD43 was a Latino opportunity district in the benchmark, and remains one in Plan H283.

326. Hidalgo County was not a drop-in county because it had surplus population. However, members in the area made some attempts to work together on a plan. Peña attended one meeting with the other three members of the county delegation, but believed they were hostile to having a Republican in the Valley. TrA125 (Peña). After that, he did not attend meetings or work with the other Hidalgo County representatives. TrJ73 (Fischer); V. Gonzales Decl. at 4. Interiano also did not work with other members of the Hidalgo County delegation because there was disagreement on whether to draw a district that would help Peña be re-elected. TrJ1579 (Interiano). Rep. Lozano (HD43) testified that there were "precincts that Sergio Muñoz wanted to keep but were being taken away really by surprise in some versions of the maps that were just coming out all of the sudden." TrJ1788. Muñoz, V. Gonzales, and Martinez were not happy with the Hidalgo County map in Plan H283. Solomons' direction that the House map should be a member-driven plan was not applied to Hidalgo County.

327. Interiano drew the initial configuration of what became HD41 in the final map. He wanted to draw a district that would give Peña the best chance at re-election. Tr1426-27 (Interiano). He wanted to increase the Republican performance of the district, and he looked for Republicanperforming precincts to include. Tr1428 (Interiano). Reps. Peña (Hispanic, Republican) and Guillen (Hispanic, Democrat) assisted Interiano in drawing the initial district.

328. The initial configuration of the district—then HD40—closely tracked VTDs with higher Republican performance as measured by votes for Greg Abbott in

the 2010 general election shaded in RedAppl. D-334; TrA38 (Interiano). Including Republican-performing VTDs and approaching ideal population were the only criteria for the initial configuration of Peña's district, and all other traditional redistricting criteria were subordinated to political goals. TrJ1580-81, 1590 (Interiano). The configuration of the district does not follow city lines and splits the cities of Palmhurst, Mission, McAllen, Pharr, and Edinburg. D-670, US-489. No city is entirely within HD41, and the map does not respect the cohesiveness of cities and communities. TrJ509 (Longoria).

329. Sometime around April 5, Peña signed off on a proposed district. TrA110 (Peña); TrJ2061 (Downton); D-229 at 91. This district came from plan hrc1H202 dated March 31, 2011. Guillen's plan log has a map (plan guilH119) called "new 40" in his RedAppl account dated March 29, 2011 that matches it. TrA135; D-384. As noted, Guillen worked on the initial district configuration with Interiano and Peña.

330. In his first retrogression memo written on April 7, Hanna said the Hidalgo County districts in the plan were "problematic." D-122. He noted that HD40 took "a significant dive in SSVR from its current level" and "[t]he significant reworking of the district lines in Hidalgo County means that new District 40 is likely more comparable to old District 41, but even here the SSVR drops by almost 6 points." He also wrote, "With all adjoining districts having substantially higher SSVR there is a significant risk that DOJ will conclude that the change in District 40 is retrogressive with regard to Hispanic voters through packing of Hispanics in the other districts. The safer approach would be to restore Dist. 40's SSVR to the previous low

SSVR for a district in Hidalgo County which was 68.7%." D-122.

331. Hanna's second retrogression memo written on April 12, which reviewed proposed Plan H110 (a non-public plan), raised the same concerns. D-327. No changes were made in response to Hanna's concerns.

332. In the first public House plan, Plan H113, made public on April 13, Hidalgo County had four districts wholly contained within it, and the surplus Hidalgo County population was joined with HD31 (represented by Guillen). Except for a small change in Precinct 62, the configuration of Peña's district was identical to the one he had signed off on previously. Peña's district (still HD40) had 19.8% Anglo VAP and 76.2% HVAP. Red-202 Report. It had four precinct splits in Precincts 14, 28, 62, and 124.

333. Precinct 14 was cut to include Peña's home in his district but not other areas of Precinct 14, which is not strongly Republican. TrJ1507, TrJ1583 (Interiano); US-311(political shading shows Precinct 14 to be 0-42.9% Republican based on a composite index of all 2010 statewide elections); D-335 (political shading shows Precinct 14 to be 43-47.9% in favor of Greg Abbott in the 2010 Attorney General general election).

334. Precinct 28 was cut to remove Precinct 9, which was less Republican; cutting Precinct 28 was necessary to create a removal path. TrJ1507 (Interiano); US-311 (political shading shows Precinct 9 to be 0-42.9% Republican based on a composite index of all 2010 statewide elections); D-335 (political shading shows Precinct 9 to be 48-49.9% in favor of

Greg Abbott in the 2010 Attorney General general election).

335. Precincts 62 and 124 were split to remove Rep. Gonzales's home from then-HD40 (Peña's district) and place it into then-HD41 (Gonzales's district) and to create a removal path. TrJ1507 (Interiano).

336. These splits and the overall initial configuration of the district were the result of collaboration among Interiano, Guillen, and Peña. TrJ1501-03, TrJ1584 (Interiano); TrA39-40 (Interiano). Guillen and Peña indicated to Interiano which precincts and areas they would like to have in their districts. Tr1479 (Interiano).

337. In Plan H113, HD40 (then Peña's district) was 8,256 persons (-4.92%) below ideal population. HD31 (Guillen's district) was 999 persons (.6%) overpopulated. HD41 (then Gonzales's district) was 4,737 persons (2.83%) overpopulated. HD39 was 7,746 persons (4.62%) overpopulated, and HD36 was 6,344 persons (3.78%) overpopulated. Red-202 Report (PL-994). Thus, Peña's district was underpopulated and all other Hidalgo County districts were overpopulated.

338. At the April 15 HRC hearing on Solomons' Plan H113, Reps. V. Gonzales, Martinez, and Muñoz testified against Solomons' plan, but Guillen supported it. Gonzales noted that Peña's district would contain a large majority of her current district and would be one of the smallest districts in the state at negative 4.92%. D-595 at 130. She noted that the map drastically reduced the (non-suspense) SSVR of the district from 88.3% to 64.6%, which she asserted was retrogressive. *Id.* at 131. Solomons stated that the

proper SSVR comparison was between the old HD41 and the new HD40, and that it went from 69.2% to 64.6%. *Id.* at 136. Gonzales asserted that her district was packed because the SSVR increased from 69% to 86.7%. She stated that it would require developing new member-constituent relations because the districts were so changed and did not reflect the minority citizens' preferred candidate of choice based on previous elections. *Id.* at 134. Gonzales submitted a proposed amendment that would keep the core of the current districts while increasing Republican precincts in Peña's district, and was approved by Muñoz, Martinez, and Gonzales. *Id.* at 135. Muñoz complained that he was losing the city of Pharr and that it was being split among three districts. *Id.* at 146.

339. Guillen, whose district HD31 was combined with the Hidalgo County surplus population, testified that he was disappointed to lose Webb and Duval Counties, but that he was fine with gaining part of Hidalgo County. D-595 at 172. Guillen said he played with the maps quite a bit after the census came out, and that MALDEF's map (Plan H115) required a county line break in Victoria County. *Id.* at 173. Peña asked Guillen if he was happy with the Hidalgo County proposed map, and he said he would be happy with it. *Id.* at 179-80. He also said that even though his district was very high in Hispanic population it was not packed because those counties have very high percentages of Hispanics. *Id.* at 181.

340. Luis Figueroa of MALDEF criticized Plan H113 in part for its failure to create a Latino opportunity district in the Rio Grande Valley and advocated for Plan H115, which created a new Latino opportunity district (HD32) in the Valley by combining

portions of Cameron County and Hidalgo County. D-595 at 12. This map had four districts wholly within Hidalgo County, two districts wholly within Cameron County, the new HD32 (combining portions of Cameron County with portions of Hidalgo County and all of Willacy County), and additional excess population from Hidalgo County was joined with HD43. Figueroa emphasized that the map created an additional Latino opportunity district in South Texas compared to the committee plan H113. *Id.* at 124.

341. At the April 17 HRC hearing, George Korbel, a redistricting expert, testified that there were unnecessary county cuts in the map, including in Hidalgo and Cameron County because there was a county cut in Cameron and a cut in Hidalgo, but if the spillover of the two districts were joined, there would only be one county cut. There was a discussion about whether these were county cuts or spillovers. One of the HRC members asked if doing what Korbel suggested would push population up and end up diluting the Hispanic population in HD35. Korbel said he had a plug-in fix that would show how it would work. He also testified that the map "shorted" the Hispanic population in the Valley by one district.

342. On the afternoon of April 17, Downton made further changes to Peña's district. Downton made changes with input from Peña, and there were areas that Peña wanted in his district even though they were traditionally Democratic because he thought they would support him. Downton 8-31-11 depo. (Joint Ex. J-62) at 79-80. These changes appear in plan hrc1H287, which was last modified on April 17, 2011, and in Plan H134 (Solomons' statewide substitute), which was made public April 18. D-317; PL-1615; US-

434; US-427. In Plan H134, HD40 was renamed HD41, and HD41 was renamed HD40. The district numbers were switched because the retrogression analysis comparing statistics using the same district numbers was showing dramatic changes in the districts. TrJ2034 (Downton). These changes were adopted into the map in Plan H153 (the plan passed out of the HRC on April 19) and remained in the final Plan H283.

343. Peña testified at trial that Guillen was directing the changes that Downton made to HD41 on April 17, but this testimony is not credible. Downton never mentioned that Guillen was involved in the changes; he stated only that it was Peña. In addition, the evidence does not support a finding that Guillen directed the changes. There are only three maps in Guillen's RedAppl plan log during the relevant time period. Although plan guilH127 (created April 14, last modified April 21) (D-372, D-399, D-375) has some of the same precinct changes that appeared in Plan H134, this plan was last modified on April 21 and thus it cannot be determined if the changes predated the release of Plan H134 or came after. Similarly, plan guilH128 (created April 14, last modified April 15) (D-372, D-387) shows Peña's district the same as in Plan H113. Plan guilH129 (created and last modified on April 17) contains a very different configuration of HD41. Nor is there any evidence that Guillen was familiar with Hidalgo County to the level necessary to make the precinct splits or, as a Democrat, had any motive to maximize a Republican district. The Court finds that Peña and Downton were responsible for the changes.

344. Downton's changes consisted primarily of splitting additional precincts to add or remove areas

from Peña's district, HD41. Interiano testified that most of the splits were made to "follow roads," but Interiano denies being involved in these splits, and his explanations are based on hearsay. The Court does not find it credible that Downton would have split numerous precincts simply to follow roads.

345. Downton testified that the changes were partly made in an effort to increase the population of HD41 so there was a narrower deviation between it and the surrounding Hidalgo County districts. Downton 8-31-11 depo (Joint Ex. J-62) at 80-81. In Plan H113, Peña's district was 4.92% below ideal, a fact that Rep. Gonzales had pointed out at the hearing. In Plan H153, Peña's district was 4.41% below ideal. Thus, the total population of Peña's district was increased (from 159,381 to 160,238). However, because the splits both added and removed population from Peña's district, increasing district population cannot explain all of the splits.

346. Although he denied being directly involved in the changes, Peña testified that the changes were made to "maximize" the district for Republican performance. TrA98. Peña said it was maximized by including "persuadables" that were conservatives but not necessarily Republicans. TrA104. He testified that people who pay heavy property taxes or income taxes were more likely to be conservative and "persuadable." TrA139, TrA155.

347. By objective measures available through RedAppl, the Downton/Peña changes actually slightly decreased the Republican performance of Peña's district, HD41. TrA17-19 (Interiano); US-518 (summary table showing that Republican performance decreased in the 2002 Governor's race, the 2004 CCA

Place 6 race, the 2006 Lt. Governor's race, the 2008 U.S. Senate race, and the 2010 Lt. Governor's race); US-365, US-367, US-369, US-371, US-372, US-517 (all election analysis reports). The changes were not made based on Republican shading or Republican performance measures in Red Appl. Therefore, the changes were made on some other basis.

348. Because RedAppl allocates election results homogeneously across the precinct, changes in election results are not accurately reflected when precincts are split. Someone who knows an area could split precincts in a way that they believed would increase Republican performance even though RedAppl shows a decline in performance. TrA20 (Interiano). Because RedAppl does have accurate information on race below the VTD level, a mapdrawer with racial shading turned on could split precincts by using race as a proxy to try to increase Republican performance even though RedAppl might show a decline in performance. TrA21 (Interiano). With Hispanic shading turned on or with knowledge of the racial makeup of an area, a mapdrawer could identify areas that are more Hispanic within a precinct even though they show up as being Republican based on the characteristics of the precinct as a whole. A mapdrawer could also identify areas using racial shading that had a higher Anglo VAP than the current district to find blocks to add to the district that would increase the Anglo VAP of the district. TrA27 (Interiano). Similarly, using racial shading, a mapdrawer could identify blocks within a district that had a higher Hispanic VAP than the district being drawn and remove them to lower the HVAP of the district. TrA28-29 (Interiano).

349. Downton did not change the existing splits in Precincts 62 and 124 (to exclude Gonzales's home and create a pathway).

350. The existing split in Precinct 14 to include Peña's home was changed to take less of the area surrounding his home. Downton said the change was made because Peña said he did not need the whole area, just his house. TrJ2062-63. This precinct is shaded as 43-47.9% in favor of Greg Abbot in 2010 (D-335) and 0-42.9% Republican strength on a 2010 election index (US-311). Areas excluded are generally less than 50% Anglo according to RedAppl shading. D-296. The Court lacks information to determine the specific number of Anglo and Hispanic voting age population that was moved in this change. The portion of Precinct 14 that is included in Peña's district has a lower HVAP (85.4%) than the portion of Precinct 14 excluded (86.2%).

351. A new split was made in nearby Precinct 107 to take in a small portion of that precinct. Downton said Peña wanted to include areas where he felt people were likely to vote for him based on personal relationships. TrJ2029. Peña said the splits in Precincts 14 and 107 include his home and high school. TrA146. The Precinct 107 split takes in 44 AVAP and 312 HVAP in an area that is shaded as 0-42.9% support for Abbott in 2010 (D-335) and 0-42.9% Republican strength on a 2010 election index (US-311). RedAppl shading shows the area being taken in as largely Hispanic. D-296. The portion of Precinct 107 included in Peña's district has a lower HVAP (86.9%) than the portion of Precinct 107 excluded (90.6%).

352. Precinct 52 is shown on RedAppl reports as being split in this area, but it appears to be a technical

split, since no split is visible on a map and no population is split out of HD41.

353. Previously, Precinct 28 was split to remove Precinct 9, a less than 50% Republican precinct. Rep. Muñoz (HD36) wanted to keep his district office in his district, and it was located in Precinct 103, which had been put into Peña's district. TrA152 (Peña). To accommodate Muñoz, the Precinct 28 split was removed[6] and a new split was made in Precinct 103 to place Muñoz's office back into his district and maintain a path to remove Precinct 9 from Peña's district. The Precinct 28 split that was removed put back some population into HD41 that shows as 52-56.9% in favor of Abbott in 2010 (D-335) and 43-47.9% Republican strength under a 2010 election index (US-311). RedAppl shading shows the population put back into HD41 to be heavily (>90%) Hispanic. D-296. The Court lacks information to determine what voting age population was returned to HD41. The Precinct 103 split removed an area that showed 57-100% support for Abbott (D-335) and 52-56.9% Republican support under the 2010 election index (US-311). Thus, with the changes to Precincts 28 and 103, a less Republican area was put into HD41 and a more Republican area was taken out. At trial, a RedAppl demonstration showed that areas taken out included areas that were more than 76% HVAP, which would decrease the HVAP % of the district. TrA29 (Interiano). This is confirmed by reports showing that the Precinct 103 split took out 115 AVAP and 822 HVAP, which would

---

[6] Visually, the existing split in Precinct 28 was removed, though the Red-370 report still shows a split existing there. PL-733. This supposed split involves no voting age population. US-382.

decrease the HVAP% by removing an area that was 86.5% HVAP. RedAppl shading shows the population taken out to be only 10-19.9% Anglo. D-296. The Red-110 Report indicates that the area taken out was 9.3% Anglo total population and 12.1% Anglo VAP. Longoria testified that the excluded part of the precinct includes more working-class Hispanics, and includes a higher percentage of Hispanics. TrJ519 (Longoria). This change is not consistent with Republican maximization but is consistent with Anglo maximization. It is partly explained by the need to return Muñoz's office to his district, though more of the precinct was moved into HD36 than necessary to do so.

354. In addition to keeping the splits in Precincts 62 and 124 to get to Gonzales's home, and the changes to the other existing splits, new splits were made in ten more precincts including Precincts 105, 35, 25, 6, 8, 47, 48, 95, 63, and 88.

355. Precinct 105: This split added population to Peña's district. Downton said HD105 was split to include an area with Peña's childhood home and friends into his district. TrJ2028-29. Peña testified that the area put in includes the Vineyards, which is fairly affluent and "there are aspects of that area that are favorable to me." TrA95. However, at his deposition, Peña said he had no reason to believe that any portion of the precinct was more favorable politically for him. TrA95 (Peña). Longoria testified that the part of Precinct 105 included in HD41 is a very exclusive neighborhood of private homes and a gated community, with very high income and Anglo population. TrJ1517. This split brought in an area shaded as 0-42.9% in favor of Abbott in 2010 (D-335) and 0-42.9% in favor of Republicans under a 2010

election index (US-311). This split is not consistent with Republican maximization. RedAppl shading shows the area brought in to be a mix of areas between 0-39.9% Anglo. D-296. A trial demonstration showed that some of the areas included were shaded as greater than 20% Anglo VAP in RedAppl, which when added would increase the Anglo VAP of the district. TrA27-28 (Interiano). However, this split brought in 61 AVAP (14.6% AVAP) and 357 HVAP (84.6% HVAP) in total, which would decrease Anglo VAP and increase HVAP. The portion of Precinct 105 included in Peña's district has a lower HVAP (84.6%) than the portion excluded (91.4%). The Court finds that this split was made to increase the population of the district, to include areas that Peña thought might support him based on his personal relationships, and to include affluent voters.

356. Precinct 35: This split brings in a tiny area of Precinct 35 that includes no VAP. It appears to follow a road, as Downton asserted. TrJ2029 (Downton); TrA148 (Peña). Peña does not recall asking for this split. TrA107 (Peña). The Court finds that this split was made to follow Jackson Road.

357. Precincts 6, 8, and 25: These splits all removed population from Peña's district. Downton did not recall why these splits were made but thought they were to follow roads. TrJ2029 (Downton). Peña did not recall asking Downton to split Precincts 6, 8, or 25. TrA106-08 (Peña). However, Peña said the splits in Precinct 6 and 25 separate areas with a socioeconomic difference—above the split (included in his district and where his daughter lives) is affluent, and there is a flood zone that divides the area. TrA149. Similarly, he said the split in Precinct 8 separates people with "socioeconomic differences" and follows Jackson Road.

TrA150. Longoria testified that the parts of Precinct 25 included in HD41 include densely populated, fairly well-to-do areas with a higher concentration of Anglos. TrJ513. He testified that the parts of Precinct 25 excluded have higher concentrations of Hispanics and lower income population. TrJ514. Longoria testified that the parts of Precinct 8 included in HD41 are around Plaza Mall, the McAllen Country Club, a very exclusive part of McAllen with higher income people and a higher concentration of Anglos, and an area around 2nd Street that is affluent with a higher concentration of Anglos. TrJ516. He testified that the excluded portion is not highly populated.

358. These splits remove portions of precincts that appear as greater than 50% in support of Abbott in 2010 (D-335) and greater than 50% Republican support under the 2010 election index (US-311). Thus they remove areas that appear Republican and are not consistent with Republican maximization. The area of Precinct 8 removed is shaded as 0% Anglo in RedAppl and removes 0 AVAP and 6 HVAP. Thus it removes an area that is 100% HVAP and decreases the HVAP of the district. The area of Precinct 6 removed is shaded as 10-39.9% Anglo and removes 18 AVAP and 37 HVAP. It removes an area that is only 64.9% HVAP, which increases the HVAP of the district. The area of Precinct 25 removed is mixed racial shading and removes 10 AVAP and 410 HVAP. This split removes an area that is 97.2% HVAP and thus decreases the HVAP of the district. Thus, two of the splits increase the district's Anglo VAP and one split decreases the Anglo VAP. At trial, a RedAppl demonstration showed that areas removed were greater than 76% HVAP, and thus excluding them would decrease the HVAP % of

the district. TrA29 (Interiano). In total, these three splits remove only 28 AVAP while removing 453 HVAP, and they decreased the HVAP of the district. Considered together, these splits are not consistent with Republican maximization but are consistent with Anglo maximization. The Court finds that these splits were made to increase the Anglo VAP and decrease the HVAP of the district.

359. Precincts 47, 48, & 95: These three splits all added population to Peña's district. Downton explained these splits as "almost certainly roads." TrJ2029 (Downton). The roads overlay in RedAppl shows that the district lines for Precinct 95 already followed a road, and there is no road where these precincts are split. TrA31-33 (Interiano). However, the splits do continue a straight line from Bentsen Road above, and the splits create a straighter line. TrA45 (Interiano). Peña testified that the portions of Precincts 47 and 48 brought into his district include an affluent area called Sharyland with lots of affluent Mexican-Americans and Mexican nationals. TrA150-51. Longoria testified that the portion of Precinct 47 that is excluded is working-class Hispanics. TrJ520. He also testified that the portion of Precinct 48 that is excluded includes Colonia McAllen[7] (before it was annexed), which has a very high concentration of Hispanics, and another colonia with a high concentration of Hispanics. TrJ521-22. Longoria testified that the portion of Precinct 95 that was excluded includes a former colonia with a higher

---

[7] A colonia is a community similar to a shanty-town, with sub-standard housing and a lack of roads, utilities, and basic infrastructure. PL-419 (Seifert Decl.) ¶ 8; TrJ542-542 (Seifert).

concentration of low-to-moderate income Hispanics, emphasis on low. TrJ522.

360. These splits bring into Peña's district areas shaded as 0-42.9% in favor of Abbott in 2010 (D-335) and 0-42.9% in Republican voting strength under the 2010 election index (US-311). These changes are not consistent with Republican maximization. The splits in Precincts 48 and 95 bring in areas shaded as 0-19.9% Anglo, and the split in Precinct 47 brings in mixed population. The splits bring in 439 AVAP (198 from Precinct 47 (31.7% AVAP), 65 from Precinct 48 (11.1% AVAP), and 176 from Precinct 95 (12% AVAP)) and 2035 HVAP (394 from Precinct 47 (63.1% HVAP), 466 from Precinct 48 (79.3% HVAP), and 1175 from Precinct 95 (80.2% HVAP)). Thus, the Precinct 47 split increases the Anglo VAP of the district, while the Precinct 48 and 95 splits decrease the Anglo VAP slightly. However, someone like Peña who is familiar with the area would know that areas with many Mexican nationals would reflect higher numbers of HVAP but lower numbers of HCVAP who could actually vote. The Court finds that these changes were made to increase the total population of the district (*i.e.*, to minimize deviation) but were also made on the basis of race to increase the Anglo VAP.

361. Precinct 63: This split removed population from Peña's district. Downton explained it as a road. TrJ2029 (Downton). At trial, Peña made general statements about socioeconomic differences and assumed changes were made to include "persuadables." TrA151-52. Longoria testified that the excluded areas include La Cuchilla, which is poor and has a very high concentration of Hispanics. He testified it includes an area around Leal Elementary

School that has a high concentration of Hispanics with low-to-moderate income, but it also includes a little part of a country club with a mixed population. TrJ515.

362. The Precinct 63 split removes an area that is shaded as 57-100% support for Abbott in 2010 (D-335) and 57-100% Republican voting strength under a 2010 general election index (US-311). Therefore it is not consistent with Republican maximization. It is shaded as largely 0% Anglo with some areas 10-19.9% Anglo in RedAppl. D-296. At trial, a RedAppl demonstration showed that removing this area would remove areas that were more than 76% HVAP, which would decrease the HVAP % of the district. TrA29 (Interiano). This is confirmed by the reports, which show that the split removes 165 AVAP and 701 HVAP, an area that is 79.7% HVAP, which would decrease the district's HVAP. This split is not consistent with Republican maximization but is consistent with Anglo maximization. The Court finds that this split was made on the basis of race to increase Anglo VAP% in the district.

363. Precinct 88: This split added population to Peña's district. Downton said that Peña requested it and that "he said it was a significant road, and he thought it made a more appropriate dividing line." TrJ2062. Downton later said that he recalled Peña's having him put up the city overlay, and the line conforms to the City of Alton line. At trial, Peña testified that the line tracks the edge of the City of Alton, which is a colonia, and that communities on the other side of the split (split into his district) are "dramatically different" and affluent. TrA100, TrA155. However, at his deposition, Peña said he had no reason

to believe that the political performance of one part or the other would be superior. TrA99 (Peña). Longoria testified that the portions of Precinct 88 included are a higher concentration of Anglos and higher-income population, and also a sparsely populated mobile home park and mixed population but generally more Anglos. TrJ522-23.

364. The precinct split tracks Shary Road and the edge of the City of Alton. The area that is brought into HD41 is shaded as 0-42.9% support for Abbott (D-335) and 0-42.9% Republican voting strength under a 2010 election index (US-311). Therefore it is not consistent with Republican maximization. RedAppl shades the area as mixed between 0-39.9% Anglo. D-265. At trial, a RedAppl demonstration showed that areas of greater than 20% Anglo VAP were included, which would increase the Anglo VAP% of the district. TrA28 (Interiano). This is confirmed by the reports, which show that the change brings in 65 AVAP and 211 HVAP (and population that is 23.4% Anglo VAP), which would increase the Anglo VAP of the district. This split is not consistent with Republican maximization but is consistent with Anglo maximization. The Court finds that this split was made on the basis of race to increase the Anglo VAP% of the district.

365. HD41 contains all or part of 42 precincts. Red-110 Report (US-382). RedAppl reports indicate that 17 precincts are split, although three (35, 52, and 28) do not involve any population. With 17 precinct splits, 40% of the precincts in the district are split. With 14 precincts, 33% of the precincts are split.

366. Approximately 46% of all the Anglo voters in Hidalgo County are placed in HD41. Tr369 (Martin);

V. Gonzales Decl. (docket no. 331) at 5 (noting that half of the Anglos residing in Hidalgo County are in the new HD41).

367. In Precincts 105, 107, 14, 25, 8, 47, 48, 95, 63, 103, and 88, the portions of split precincts excluded from Peña's district are all significantly higher in HVAP than the portions included in Peña's district. Only in Precinct 6 is the HVAP% higher in the included portion than the excluded portion.

368. Dr. Arrington examined all 17 split precincts as a whole and found that the portions of split precincts excluded from HD41 are more heavily Hispanic than areas included. TrJ141-43 (Arrington). He concluded that the map drawer was shaping this district to make it more Anglo than it was before, and more Anglo than any district in Hidalgo County was before. TrJ143. Making the district more Anglo reduces the ability of Hispanics to elect a candidate of their choice. TrJ144 (Arrington). Considering all 17 split precincts in HD41, 7,239 AVAP and 26,019 HVAP are included, and 3,171 AVAP and 38,643 HVAP are excluded. US-516[8]. This is a net gain of 4,068 AVAP and a net loss of 12,624 HVAP. US-516. Arrington also found that the average HVAP of blocks split out is 92.1% and of blocks split in is 77.6% TrA23 (Interiano).

---

[8] The Court has confirmed that the totals in this exhibit are correct, but a number of entries in the individual columns are wrong. In addition, Arrington's analysis includes "split" precincts 28, 35, and 52, which did not actually split any VAP. However, the same trend is seen when those precincts are not included in the total. Not including the precinct splits that do not split any voting age population (*i.e.*, not considering Precincts 28, 35, and 52), the precinct splits resulted in a net gain of 3,420 AVAP and a net loss of 13,696 HVAP.

Similarly, AVAP of blocks excluded from Peña's district is 7.6% while AVAP of blocks included is 21.6%. TrA24 (Interiano). Arrington's testimony supports the conclusion that, with regard to split precincts overall, areas with higher Anglo VAP were retained and areas with higher Hispanic VAP were excluded from Peña's district. This supports the conclusion that HD41 was drawn to maximize Anglo VAP.

369. DOJ contends that the precinct splits made by Downton between Plan H113 and Plan H134/H153/H283 were race-based. The Court finds that some, but not all, of the splits were race-based. The Court is unable to determine the exact effect on HVAP and AVAP for the changes to Precincts 14 and 28 because it lacks the Red-110 Report for Plan H113. However, Precincts 25, 8, 63, and 103 were all split to remove areas that appeared to be Republican yet decreased the HVAP% of the district. In addition, the Precinct 88 split and the Precinct 47 split bring in areas that do not appear favorable to Republicans, yet increase the Anglo VAP%. Looking just at these metrics, these precinct splits are consistent with an improper use of race and intentional vote dilution. Although the Precinct 48 split decreases the Anglo VAP slightly, the HVAP in that area includes many Mexican nationals, and thus someone like Peña would know that the Anglo CVAP was actually higher and thus this split would increase the number of Anglo voters.

370. However, the other splits in Precincts 105, 107, 6, and 95 do not support a finding of an improper use of race. Although the Precinct 105, 107, and 95 splits all brought in areas that appeared to be 0-42.9%

in favor of Abbott (D-335) (so that they would not make the district more Republican in RedAppl), they were racially shaded as primarily Hispanic, and each brought in populations that would increase the HVAP of the district. And the Precinct 6 split removed an area that appeared Republican but also removed population that was 31.6% Anglo VAP.

371. Between Plan H113 and Plan H134/H153/H283, the total population of Peña's district went from 159,381 persons with 111,239 VAP to 160,238 persons with 111,689 VAP. Therefore, despite all the precinct splits, the net change was only 857 persons and only 450 persons of voting age. Red-202 Reports.

372. Between Plan H113 and Plan H134/H153/H283, Peña's district went from 16.3% Anglo population and 19.8% Anglo VAP to 16.2% Anglo population and 19.7% Anglo VAP. Thus, Anglo VAP decreased by .1%. Pena's district went from 79.9% Hispanic population and 76.2% HVAP to 79.8% Hispanic population and 76.2% HVAP. Thus, Hispanic VAP remained the same. HCVAP went from 72% to 72.1%. Total SSVR increased from 71,487 (62.9%) to 71,813 (63%). Red-202 Report. Non-suspense SSVR went from 60,631 (64.6%) to 60,984 (64.6%).

373. No changes were made to the district after Plan H134. Plan H134, Plan H153, and Plan H283 have the same SSVR and the same 17 precinct splits. D-335; US-311; PL-733 (Red-370 Report); TrJ2029 (Downton).

374. On April 19 at the HRC formal meeting, Rep. Veasey offered an amendment (Plan H119) to Plan H134 that would amend only the Hidalgo County

districts HD31, 36, 39, 40, and 41, but it failed (Ayes were Villarreal, Alonzo, Alvarado, Veasey).

375. On April 20, David Hanna wrote his retrogression memo concerning Plan H153. D-338. There were some changes between the second and third memos regarding the Hidalgo County area. TrJ1196 (Hanna). The district numbers for HD40 and HD41 were swapped, but the retrogression analysis did not change. TrJ1196 (Hanna). Hanna noted that HD41's SSVR dropped by almost 6 points, while the surrounding districts all had substantially higher SSVR, creating a risk that DOJ would conclude that HD41 was retrogressive through packing of voters in the surrounding districts. Hanna recommended restoring HD41's SSVR to its previous level of 68.7%. US-338. These concerns were never resolved. TrJ1164 (Hanna). Hanna did not perform an offset analysis to see if any retrogression could be made up elsewhere, nor did he perform any election analysis regarding HD40 and HD41. TrJ1196 (Hanna).

376. On April 22, Stacy Napier from the OAG sent Bruce and Downton an RPVA for Plan H153. It showed the performance of HD41 decreasing from 7 out of 10 elections in the benchmark plan to 5 out of 10 elections in Plan H153. US-190/190A. Interiano, Bruce, and Downton discussed the RPVA (thought not specifically as to HD41) via email, and Solomons was copied. US-169; US-176. Based on the RPVA, Interiano and Downton were aware that the performance for Hispanics was decreased in HD41. TrA9 (Interiano).

377. During the April 27 debate on Plan H153, Rep. Martinez noted that although Solomons had said it would be a member-driven map, a lot of amendments from members, especially from the Valley, were not

taken into account or adopted. D-13 at S100. Martinez asked who Gerardo Interiano was, and Solomons responded that he was working out of Speaker Straus's office, but at Solomons' direction. *Id.* at S100-01. Martinez noted that he, Rep. Gonzales, and Rep. Muñoz had testified against the Valley configuration at the HRC hearing and also raised a point of order on the basis that the legislators were not included in the minutes. *Id.* at S102.

378. During the floor debate, Rep. V. Gonzales offered amendments to the Valley. Gonzales, Martinez, and Muñoz presented Amendment No. 18 (Plan H187) relating to Hidalgo County. D-190 at 123-124; D-13 at S186. Gonzales discussed the major changes that had been made to Hidalgo County districts, including that her district and Peña's district had essentially been swapped and they both had 1.5% or less of their prior districts. D-13 at S186. She stated that she would have to start all over with member-constituent relationships. *Id.* at S190. She noted that Martinez's district was also changed (he stated that he had only 72% of his district) and Muñoz had only 57.2% of his prior district. She also noted that the HD40 and HD41 district numbers had been swapped and that they tried to make Peña's district a Republican district. She noted that 14 VTDs are split, despite Solomons' having objected to Farias's proposed Bexar County amendment based on an increase in split VTDs. She complained that the committee map did not create a new district in the Rio Grande Valley despite the population growth, and that Peña's district would be one of the smallest in the state. *Id.* at S186-87. Gonzales stated that her proposed amendment would put "us basically back to where we were" by

adjusting the population and preserving communities of interest, without splitting any VTDs. *Id.* at S188. She also stated that she believed there was retrogression and the committee plan would not be pre-cleared. *Id.* at S189. Rep. Aliseda (Hispanic, Republican) noted that MALDEF's representative Figueroa had previously testified that the Hidalgo County map would not violate the VRA, and Gonzales responded that Figueroa had been concerned with § 2, not § 5 and Figueroa was not aware of the issues. *Id.* at S190. Aliseda asked if the proposed amendment would affect Rep. Peña's Republican numbers. Rep. Oliveira stated that if you combine Cameron and Hidalgo County, you could create seven districts in the Valley and create a brand new Latino opportunity district while keeping the other districts. *Id.* at S191-92. Oliveira also criticized the over-reliance on the County Line Rule, and he and Rep. Burnam asserted that the Legislature was being inconsistent on its use of the rule and its insistence on 50% SSVR. *Id.* at S192-93. Rep. Guillen noted that Gonzales's amendment did not create a seventh Valley district, and Oliveira responded that those maps were laid out in other plans. *Id.* at S193. Oliveira stated that Guillen was protected by being given Hidalgo County population that he did not need in order to keep his minority opportunity district, but "that population was sacrificed for your benefit and perhaps for Representative Peña." Guillen stated that he was not sure "about the logic behind" the assertion that it was drawn for his benefit. *Id.* at S193-94. Rep. Martinez asked who drew the lines for the Hidalgo County map, and neither Solomons nor Villarreal knew. *Id.* at S194-95. Martinez noted that someone other than the delegation had to have given input because the map

was not drawn the way he, Muñoz, and Gonzales had asked, even though it was supposed to be member-driven. *Id.* at S195. Villarreal noted that he opposed the map and voted against it coming out of committee because it failed to create a district that combined Cameron and Hidalgo population. *Id.* at S195. Peña stated, "I did not draw this map. But there are certain things I do know and certain things I did ask for. I said one, please don't pair any of my colleagues. . . . The other thing I said was if there's going to be spillover I would rather have an experienced member come into the valley than a freshman. And so Representative Guillen, who you know, is somebody who is respected, senior member, so that was my suggestion. Those are the two suggestions I made." *Id.* at S195-96. Peña argued that he should be in a conservative district and Gonzales in a democratic district, and that the map was fair. *Id.* at S196. He stated he would love another Valley district but that the County Line Rule would be followed unless a court said it could be ignored. *Id.* Martinez asked Peña if he had input on the lines drawn in Hidalgo County. Peña stated that he had "some input," including that members not be paired, that the conservative member get a conservative district, that other members represent the areas they have, and that a senior member like Representative Guillen come in if there was spillover." *Id.* at S197. When asked if he had input on his own district, Peña said, "No. When I met with the members what I said to you was, look I expect that the Republicans are going to maximize the conservative seats. That's what I told you, you can recall that. And I said I will not draw this map because one, I did not want to be involved. And two, that I didn't want to be involved in pairing or being involved in affecting my neighbor's

districts." *Id.* at S198. Martinez asked him "So, the drawing of your lines in your district you didn't have any input in?" and Peña said "No, I never even bothered to learn the RedAppl." *Id.* Peña agreed that the Valley needs a new district, but only if the court would give permission to break the County Line Rule. *Id.* at S199. Rep. Castro pointed out that the objection to Rep. Farias's amendment in Bexar County was that it created a jagged line, yet HD41 was full of jagged lines. Peña stated that "the entire map has that sort of thing" and that he did not draw it, and then he moved to table. *Id.* The amendment was tabled. D-13 at S203.

379. Gonzales offered another Hidalgo County plan, Amendment No. 19 (H162) that tried to keep the core of the districts the same but attempted to create a more Republican district for Peña, as more of a compromise than the previous amendment. D-13 at S203; D-190 at 125-26. Solomons told members to "vote their consciences." D-13 at S203. It was tabled. *Id.*

380. Rep. Martinez Fischer laid out a statewide amendment (Amendment No. 29) (H196). Rep. V. Gonzales emphasized the Latino growth and the need for a seventh Valley seat (HD72) by combining Cameron and Hidalgo Counties. D-13 at S217-18. This map had seven districts wholly in Hidalgo and Cameron Counties, and part of HD43 also came into Cameron County. This map had been debated with regard to other areas. Citing the County Line Rule and prior debate, Solomons moved to table, and the amendment was tabled. D-13 at S218.

381. Martinez Fischer also offered Plan H201, which created a seventh Latino opportunity seat in the Valley by combining the spillover from Hidalgo and

Cameron Counties to create a new HD144. Martinez Fischer/Gonzales depo. at 19. This map had seven districts wholly contained within Cameron and Hidalgo Counties. It also had a County Line Rule violation in Nueces County to keep HD33 as a Latino opportunity district. With only 33.2% HCVAP, HD35 was no longer a Latino opportunity district. Despite the loss of HD35, this map did result in a net gain of one HCVAPmajority district in South Texas over the committee plan with the addition of HD144 and retention of HD33. Martinez Fischer/Gonzales depo. at 19. It has a total of 13 HCVAP-majority districts in South Texas (31, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 80, & 144). However, it had a County Line Rule violation in Nueces County, and without that violation to include Nueces County population in HD32, HD32 would be outside the permissible population deviation.[9] Rep. Lozano (Hispanic, Republican) testified at trial that he would have preferred H201 over H283 because it created a new Rio Grande Valley district. TrJ1821 (Lozano). The amendment was tabled.

382. In Plan H283, approximately 1.5% of Peña's constituents are the same as in Plan H100. Tr366 (Martin). Most of the areas represented by Peña in H283 are areas he had not represented before. TrJ509 (Longoria). Peña's district HD41 is underpopulated by 7,399 persons, while the other districts in Hidalgo County are overpopulated—HD31 by 999; HD36 by 4,368; HD39 by 7,746, and HD40 by 5,856 persons.

---

[9] HD32 was -3,277 (-1.95%) underpopulated, and it included 20,381 persons from Nueces County. Therefore, without Nueces County population, it would be -23,658, well outside the permissible deviation from the ideal of 167,637.

Tr1478, Tr1000 (Downton); Tr369 (Martin); Red-202 Report. Peña's district is one of the smallest in Plan H283. The under- and overpopulation of districts in Hidalgo County was intentional to make the district as Republican as possible and to give Peña the best opportunity to be re-elected. Tr1478 (Interiano); Downton 8-31-11 depo. (Joint Ex. J-62) at 81. Downton admitted that adding population into HD41 to minimize the deviation would make the district more Democratic. Tr1001. HD41 was intentionally underpopulated to avoid putting in additional voters because they would be largely Latino and would vote Democratic. Tr372 (Martin). Kousser testified that HD41 splits more precincts than the entire Texas Senate plan, and the pattern of population shows that "it captures just about all of the heavily Anglo areas that it possibly could" in a county that is heavily Latino. Tr247 (Kousser); Joint Expert Ex. E-2 (Kousser report) at 92-97 & n.64.

383. Dr. Arrington testified that, because of the numerous precinct splits in HD41, reconstituted exogenous election analyses do not provide an accurate picture of electoral opportunity in HD41. TrJ120, TrJ141-42 (Arrington); *see also* US-351 (Handley report) at 9-10.

384. Dr. Engstrom concluded that HD41 in Plan H283 was a Latino opportunity district. Joint Expert Ex. E-8 (Engstrom Corr. Rebuttal Report docket no. 307) at 28.

385. Dr. Alford notes that Democrats win benchmark HD41 in 32 of 48 (67%) of contested statewide races, this number drops to 23 of 48 (48%) in Plan H283. US-350 (Alford Report) at 8.

386. Plaintiffs offer demonstration Plan H291 that equalizes the population of the four Hidalgo County districts and raises the SSVR of H41 to 75.3% total/75.1% non-suspense. Tr373 (Martin). It has a deviation of .4%. *Id.*

387. The Rio Grande Valley is a community of interest that includes Hidalgo County, Cameron County, Starr County, and Willacy County. TrJ540 (Seifert); PL-456 Decl. of Hidalgo County Judge Ramon Garcia. The Valley is a community of interest with shared issues and similar socio-economic characteristics, geography, and challenges. PL-456 (Garcia declaration); Tr630-31 (Garcia); PL-419 (Seifert Decl.) ¶ 7. Cameron and Hidalgo Counties share issues with border security, colonias, and flooding. PL-419 (Seifert Decl.) ¶¶ 15, 8-10, and 12. Hidalgo and Cameron County residents are more aligned with each other than with residents of the largely rural Starr and Zapata Counties, yet Plan H283 joins the excess population of Hidalgo County to Starr and Zapata Counties with a representative who does not live in Hidalgo County. V. Gonzales Decl. (docket no. 331) at 4-5. Instead of joining Hidalgo and Cameron Counties, both counties are joined with multiple other counties, preventing an increase in representation for the people of the Lower Valley. *Id.*

388. Hidalgo County and Cameron County grew faster than the State of Texas as a whole between 2000 and 2010. Hidalgo County grew at a rate of 36.1% compared to the State average of 20.6%. PL-298. Cameron County grew at a rate of 21.2%. PL-296.

389. In 2010, Hidalgo County had enough population for about 4.62 ideal-sized districts. Tr363 (Martin); Tr1447 (Interiano); D-200. Cameron County

had enough population for about 2.42 ideal-sized districts. Tr1446 (Interiano); D-200. Plaintiff groups and certain legislators, including Democrat Trey Martinez Fischer and Republican Jose Manuel Lozano (HD43) advocated for a new Latino opportunity district in the Rio Grande Valley. TrJ1812 (Lozano). Rep. Oliveira argued on the floor on April 27, 2011 for the creation of a seventh Latino opportunity district by combining the Hidalgo and Cameron surplus. US-198 at 95-96.

390. The surplus population from Cameron and Hidalgo could have been joined to form a new Latino majority opportunity district without violating the County Line Rule and without forcing a county line break elsewhere in the map. TrJ1542-45 (Interiano); TrJ1044-45 (Downton); Tr462-63 (Flores); Plan H309; Plan H358. Joining Cameron and Hidalgo Counties would unite a community of interest and increase representation for the Rio Grande Valley. PL-456 (Garcia declaration); Tr630-31 (Garcia). However, while this does create a new Latino opportunity district in the Lower Rio Grande Valley, it does not necessarily result in the creation of an additional Latino opportunity district in the overall South Texas area. In Plan H309 and Plan H358, there are twelve HCVAP-majority districts in South Texas (HD31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 80), the same as in Plan H283.

391. The Legislature failed to create a new Latino opportunity district in the Valley. Downton testified that he tried to draw a Cameron+Hidalgo district but does not remember the result. TrJ2140. Interiano testified that no one gave him a proposal that created the district without also including a split around

Nueces County. Tr1429. He believed that drawing the district would create a split somewhere else in the map. Tr1448. He said he could not draw the district in a way that did not create a split further up in the map. TrA58. However, he could not identify the split allegedly caused by such a district at trial. TrJ1543 (Interiano). Interiano stated that he did not draw a new Cameron+Hidalgo district because he did not believe the Legislature needed to maximize the number of minority districts. Tr1499. Downton concluded that the district was not legally required, and testified that it was a policy decision not to draw it. TrJ2095 (Downton).

392. The Task Force Plaintiffs offer Plan H292 that creates a new district (HD32) in the lowerValley with an 85.6% HCVAP using 2005-2009 ACS. Joint Map Ex. J-37; D-111; PL-342 (docket no. 325-4 at 21); Tr463 (Flores). In the Valley, four districts are located within Hidalgo County and the excess population of Hidalgo County is joined with Cameron County. Cameron County has two districts wholly within in it, and some of its excess population is joined with HD43. This Plan splits the surplus population of Cameron County into two different districts, HD32 and HD43. This plan maintains CD35 as a majority-HCVAP district. It also has a County Line Rule violation in Nueces County to create two HCVAP-majority districts (HD33 and HD34) in Nueces County. It has 14 HCVAP-majority districts in South Texas (31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, & 80).

393. LULAC proposes Plan H294, an eleven-district plan for South Texas that includes a district created by combining the excess population in Cameron and Hidalgo Counties. Joint Map Ex. J-39.

This would plug into Plan H283. However, this plan does not create any new HCVAP-majority districts, because it would replace eleven districts that are all HCVAP majority (31, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 80) in Plan H283 (though HD35 is challenged by the Plaintiffs as not being an opportunity district in Plan H283).

394. MALC also proposes a seventh district combining the Hidalgo and Cameron surplus (new HD35) in Plan H295. Plan H295 had seven districts wholly contained within Cameron and Hidalgo Counties, moving South Texas HD35 (an existing HCVAP-majority district) into the Lower Valley. This plan violates the County Line Rule in Nueces County.

395. The Rio Grande Valley has been one of the fastest growing areas from 1990 to 2010 and is an integrated economic, cultural, social, and political region. The small towns in the area represent a community of interest. Joint Expert Ex. E-8 (Flores report) at 10.

396. Latinos make up the majority of the population in the Rio Grande Valley. The shared cultural affinities and social conditions of these Latino communities have led to a high level of political cohesiveness of Latinos in the area. PL-419 (Seifert Decl.) ¶ 6. 98% of the population of Brownsville is Mexican American. TrJ542 (Seifert). About 300,000 of the 1.2 million people in the Valley reside in colonias. TrJ541 (Seifert). Some colonias, such as Cameron Park, still have unpaved roads, and the per capita income in Cameron Park is $4,100. TrJ550 (Seifert). Cameron Park and other Valley communities share socioeconomic issues, poverty, lack of good jobs, and lack of access to health services and public hospitals.

TrJ550-51 (Seifert). Cameron Park has been able to get improvements through political organizing and voting. *Id.* A district that combines portions of Cameron and Hidalgo Counties reflects a community of interest. PL-419 (Seifert Decl.) ¶ 7.

397. All districts in Cameron County and Hidalgo County in Plan H283 are majority-HCVAP districts. Defendants attempted to elicit testimony from lay witness Michael Seifert that all of the districts in Plan H283 would be Latino opportunity districts, but he did not know what that term meant. TrJ559 (Seifert). Upon further questioning, Seifert did agree that "all of those districts [in Cameron and Hidalgo County in Plan H283] currently elect members to the legislature who are Hispanic" and "so that would mean that every voter who lives in Hidalgo and Cameron County would live in a district that would elect a Hispanic." TrJ559. However, this testimony is meaningless. None of the districts in Hidalgo County and Cameron County in Plan H283 were "currently electing" any members because all of those districts were changed in the interim map. Further, as a lay witness, Seifert could only speculate about whether the districts could elect a Hispanic, especially regarding HD41.

398. Dr. Engstrom found racially polarized voting in the 52-county area he classified as South Texas, which included the Rio Grande Valley. Tr503 (Engstrom); Joint Expert Ex. E-7. He found weak support for Latino candidates among non-Latinos in these counties. The highest level of support by them for any Latino Democratic candidate in the general election was 19.1%. And none of the five Latino candidates in the Democratic primaries received as much as 40% of their votes. In his corrected rebuttal

report, Joint Expert Ex. E-7 (Docket no. 307-1), Dr. Engstrom found racially polarized voting in general and primary elections in the 52-county area he classified as South Texas. He found that Latinos are cohesive in support of Latino candidates in general and Democratic primary elections. This preference was shared by non-Latinos in only one general election and no primaries. In other words, Latinos and non-Latinos shared a preference for the Latino candidate in only 1 of 17 elections studied.

399. In Hidalgo County, 39.3% of Hispanics lack a high school education. Joint Expert Ex. E-1 (Chapa Report) Table 4. In Cameron County, 43.3% of Hispanics lack a high school education. *Id.*

400. In Hidalgo County, the per capita income for Hispanics is $11,617, compared to $27,198 for non-Hispanic Anglos. Joint Expert Ex. E-1 (Chapa Report) Table 5. In Cameron County, the per capita income for Hispanics is $11,568, compared to $29,394 for non-Hispanic Anglos. *Id.*

401. In Hidalgo County, 38.1% of Hispanics live in poverty. Joint Expert Ex. E-1 (Chapa Report) Table 6. 48.65% of Latino children live in poverty, compared to 23.09% of non-Latino Anglos. Joint Expert Ex. E-9 (Gonzalez-Baker Report) Table 8. In Cameron County, 37.2% of Hispanics live in poverty. Joint Expert Ex. E-1 (Chapa Report) Table 6. 27.27% of Latino children live in poverty, compared to 3.19% of non-Latino Anglos. Joint Expert Ex. E-9 (Gonzalez-Baker Report) Table 8.

402. Using 2005-2009 ACS data, Cameron County's estimated HCVAP is approximately 78.7%

and Hidalgo County's estimated HCVAP is approximately 82.6%. D-218.

403. In 2010, all Valley districts elected Latino-preferred candidates. After his re-election as a Democrat, Rep. Peña switched parties. The configuration of Hidalgo County was not member-driven. Instead, Peña and Downton worked together to draw a district that would give him the best chance at re-election as a Republican. To do this, they created the most Anglo, Republican district possible, which meant creating an almost completely new district for Peña (only 1.5% of his constituents are the same) and basically switching his district with incumbent Gonzales's district. The district was also intentionally underpopulated because any additional population would have been less likely to vote for Peña. The mapdrawers ignored Hanna's suggestion to raise the SSVR of Peña's district because it was low in comparison to the surrounding districts.

404. Downton's precinct splits included less Hispanic portions of precincts in Peña's district and excluded more Hispanic portions of the precincts. Many of the precinct splits make the district less Republican by objective measures, and thus these splits were not based on making the district more Republican by objective measures. Several of the precinct splits are consistent with an improper use of race.

405. Despite support from both Republican and Democrat legislators from South Texas, the Legislature did not create a new Latino opportunity district in the lower Valley by combining the excess population of Hidalgo County with the excess population of Cameron County. However, no plan was

presented to the mapdrawers that created this district as an additional Latino-majority district that did not also have a County Line Rule violation.

Harris County

406. In 2000, Harris County had 24.4625 districts based on ideal population. D-212.

407. The Texas House passed a plan in 2001 that had 24 seats in Harris County by a vote of 76 to 71. D-49 (House J. Supp. May 7, 2001) at 11; D-127. Democrat members, including Reps. Coleman, Farrar, Hochberg, Martinez Fischer, Thompson, and Turner, generally voted for the map with 24 Harris County seats. TrJ1327-28 (Coleman); TrJ1665 (Hochberg); D-49 at 11.

408. However, because the Legislature failed to pass a map in 2001, the LRB drew the map that was eventually put into place. The LRB rounded up, and placed 25 districts in Harris County. TrJ1667 (Hochberg); TrJ1278 (Thompson). Rep. Hochberg questioned it at the time, but he was told by an attorney that there was no court precedent on which direction it had to go, so it was not challengeable. TrJ1666-67 (Hochberg). Rep. Coleman testified that he supported the LRB's change to 25. TrJ1328 (Coleman).

409. Hochberg had been elected in HD132, but in the 2001 LRB map he was placed in HD134, so he moved to HD137. TrJ1644-45 (Hochberg). Hochberg felt the 2001 redistricting targeted leading/active Democrats. TrJ1647 (Hochberg). Hispanics in the district that became the new HD137, especially those living in apartments, had not had good turnout, but their turnout improved with voter outreach efforts. TrJ1646-47 (Hochberg).

410. At the Houston field hearing on November 20, 2010, Rogene Calvert of the Texas Asian American Redistricting Initiative ("TAARI") testified about the Asian population in Houston/Harris County and Fort Bend County, which borders Harris County to the southwest. D-117; US-461 at 3. Calvert asked that the Asian community be kept together. US-461 at 3. In Harris County, the Asian population is located primarily in the southwest, including Alief and Sharpstown. Tr419 (Calvert); US-322A; Tr1363-64 (Vo). In the benchmark plan, the Alief area was in four districts—HD149, HD133, HD131, and HD137. TrJ1377-78 (Vo). The most concentrated Asian census blocks were together in HD149, though there were also some concentrated Asian populations, Vietnamese and Chinese, in HD137. TrJ1364-65 (Vo); US-322A. Calvert testified at trial that, although they are too small in total numbers to control elections, the Asian community has been able to form coalitions with other minorities in the area such that the Asian population can elect candidates of their choice. Tr420. Calvert wanted the Legislature to consider that the Asian-American community in that area was very concentrated and had demonstrated its political strength through the election of candidates of their choice, and they did not want to be divided or diluted in redistricting. Tr421 (Calvert).

411. In Harris County, the minority population (including Hispanic, African-American, and Asian) grew between 2000 and 2010, while the Anglo population declined. TrJ1437 (Korbel); Joint-Expert Ex. E-5 (Martin Report) at 5. The Harris County Hispanic population increased by almost 552,000. The African-American population increased by over

134,000, and the Asian population increased by 76,827. Joint Expert Ex. E-5 (Martin Report) at 5; Joint Expert Ex. E-2 (Kousser Report) at 89. The Anglo population decreased by 82,000 or more. Tr338 (Martin). All of the growth in Harris County was due to the increase in minority population. *Id.* The HCVAP in 2000 was 19.04%. D-230. According to the 2005-2009 ACS data, it was 22.53%, and according to the 2008-2012 ACS data, it was 25.36%. D-218; D-231.

412. In 2010, the Anglo population share of Harris County was 33%. Tr338 (Martin). Harris County was 40.8% Latino, 18.9% African-American, and had a fairly significant Asian population. *Id.*

413. At the start of 2011 redistricting, there were 25 districts in Harris County; 13 were Republican and 12 were Democrat. TrJ1265 (Thompson).

414. One of the first decisions that had to be made for Harris County was how many seats to apportion to it. Tr1567 (Solomons). It was undecided at the beginning of the process whether to have 24 or 25 districts. Tr930 (Downton); Downton 8-31-11 depo. (Joint Ex. J-62) at 108. Based on ideal population size and census data, Harris County had 24.4126 districts. D-214; D-221; D-124_13; PL-226. With either 24 or 25 districts, Harris County districts would be within the permissible deviation range from the ideal population size. D-214; TrJ1326 (Coleman). Staff and leadership had various conversations about the issue. Downton 8-31-11 depo. (Joint Ex. J-62) at 108. Downton's opinion from the beginning was that it should have 24. Downton and TLC made that recommendation, and Downton believes there were other attorneys who made it as well. Tr931 (Downton). But Downton tried to draw it both ways, and he asked the delegation to

draw it both ways. Downton 8-31-11 depo. (Joint Ex. J-62) at 108.

415. Plaintiffs claim that past practice supported rounding up to 25. *E.g.*, TrJ1326 (Coleman). LULAC-13 shows historically the number of House seats assigned to Harris County and ideal population. It shows that in 1980, 25.40 was rounded up to 26 (it does not specify who made the decision; it only states "3 changes 2 by legislature and 1 by Federal Court"). LULAC-13; Alvarado Decl. (docket no. 331) at 4. It appears that the plan was enacted by the three-judge court in *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), based on an LRB plan modified to remedy DOJ objections. It was then adopted by the 68th Legislature in 1983.

416. LULAC-13 also shows that after the 1990 census, 24.89 was rounded up to 25 (again it does not specify who made the decision; it only states "changes by Court and Legislature"). LULAC-13; Alvarado Decl. (docket no. 331) at 4. This plan was enacted by the Legislature and then modified by the three-judge court in *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991).

417. As noted, in 2001, 24.46 was rounded down to 24 by the House, but the LRB rounded up to 25 in its plan.

418. Korbel testified that, from 1980 to 2000, Harris County has been "redistricted in one way or another" fifteen times, and in eight of those fifteen times, the excess population above a whole number of districts was less than .5, but it was always rounded up. Tr702. Korbel said that the policies utilized by the State up until 2011 would have resulted in 25 seats.

Joint Expert Ex-11 at 2. He stated that, contrary to the State's assertion, there is no rule regarding rounding. Tr756.

419. Dr. Murray testified that it made sense, as in previous redistricting cycles, to round up partly to compensate for the acknowledged undercount and the imprecision of the census count. Tr892. This is especially true given the large population of Hispanics and Asians in Harris County, which are most likely to be undercounted. Tr892; V. Gonzales depo. at 33-34, 40. He noted that Harris County grew at almost the exact same rate of growth (20.4%) as the State (20.6%). Joint Expert Ex. E-4 (Murray Report) at 26.

420. The benchmark plan had six African-American districts. Tr352 (Martin). These included HD131 (47.7% BVAP) (Allen); HD139 (47.2% BVAP) (Turner); HD141 (42.8% BVAP) (Thompson); HD142 (42.7% BVAP) (Dutton); HD146 (47.1% BVAP) (Miles); and HD147 (39.2% BVAP) (Coleman). All of these districts were represented by African-American Democrats. All of these districts were majority-BCVAP districts using 2005-2009 ACS data. HD131 was 58.7% BCVAP; HD139 was 61% BCVAP; HD141 was 54.1% BCVAP; HD142 was 54.5% BCVAP; HD146 was 53.9% BCVAP; and HD147 was 50.8% BCVAP.

421. The benchmark plan had three performing HCVAP (using 2005-2009 ACS data) and SSVRmajority districts: HD140 (66.1% HCVAP; 57.9% total SSVR) (Walle); HD143 (64.7% HCVAP; 64.8% total SSVR) (Hernandez-Luna); and HD145 (68.9% HCVAP; 65.2% SSVR) (Alvarado). These districts were represented by Hispanic Democrats.

422. In addition, HD148 was less than 50% HCVAP/SSVR (42.1% HCVAP using 2005-2009 ACS data; 39.4% total SSVR) but performed for Latinos. Tr80 (Martinez Fischer); Tr1039-40 (Murray); Joint Expert Ex-5 (Martin Report) at 6. HD148 had elected Jessica Farrar, a Hispanic Democrat, every election since 1994, and thus the Latino candidate of choice was successfully elected in both primary and general elections in the district. Farrar Decl. (docket no. 331) at 3. HD148 was an effective Latino district based in the traditional North Side and Heights neighborhoods. Joint Expert Ex-5 (Martin Report) at 6; Farrar depo. at 37. Mapdrawers and Hanna were aware that HD148 was a performing Hispanic district even though it was not a majority-HCVAP/SSVR district. TrJ2049 (Downton); TrJ1215-16 (Hanna); D-122 at 5; Farrar depo. at 40-41.

423. Similarly, benchmark HD137 was not a majority-HCVAP district but it performed for Latinos and minorities. Tr352 (Martin). It had a high Hispanic population—63.8% Hispanic population and 59.8% HVAP. TrJ1642 (Hochberg). It was a diverse district, with 35.5% Anglo CVAP, 26.4% BCVAP, 25.6% HCVAP, and 11.6% Asian CVAP based on 2005-2009 ACS data. D-100 at 32; TrJ1354 (Vo); TrJ1642 (Hochberg). The combined minority CVAP in HD137 was 64.5%. TrJ1643 (Hochberg). Despite the high Hispanic population, it had only 22% total SSVR.

424. HD137 had elected Scott Hochberg, an Anglo Democrat, since 2002. TrJ1641 (Hochberg). Hochberg testified that minority voters controlled the outcome of elections in the district. TrJ1642. Hochberg analyzed election results, and they consistently showed that he would not have won without the support of minority

voters. *Id.* Sarah Winkler also provided lay testimony that the minority coalition in Alief is able to elect candidates of choice to the Texas House in HD137. Tr426. The State described HD137 as a fifth Latino opportunity district in its 2001 preclearance submission. Joint Expert Ex-5 (Martin Report) at 6; Tr352 (Martin); TrJ1643 (Hochberg) (Texas had indicated that HD137 provided Latino opportunity when justifying the district for preclearance after the 2001 redistricting cycle).

425. The benchmark plan also had a second effective minority coalition district, HD149. Tr352 (Martin); TrJ135-36 (Arrington); Tr827 (Turner). Benchmark HD149 was very diverse, with 37.6% Anglo CVAP, 26.1% BCVAP, 19% HCVAP, and 16.2% Asian/Other CVAP. D-100 at 32; TrJ1342-43, TrJ1346 (Vo); Tr350 (Martin). HD149 had a strong influence from Asian Americans. TrJ1648 (Hochberg); TrJ1342-46 (Vo). No particular ethnic group controlled the district; it was a multi-ethnic coalition. TrJ1648 (Hochberg); Tr350 (Martin). In the benchmark plan, HD149 was located in southwestern Harris County and included the Alief community, which has a large Asian population. Tr1342-43 (Vo). As noted, the largest concentrated area of predominantly Asian census blocks were together in HD149. TrJ1364-65 (Vo); US-322A; D-201; D-264; D-332.

426. The multi-ethnic coalition of minority voters (Asian, African-American, and Latino) in HD149 supported Hubert Vo, the first Vietnamese American in the Texas House, and successfully elected him in 2004, 2006, 2008, and 2010. Tr349-50 (Martin); TrJ1647-48 (Hochberg); Tr891 (Murray); Tr426 (Winkler). Sarah Winkler provided lay testimony that

the minority coalition in Alief is able to elect candidates of choice to the Texas House in HD149. Tr426. Vo defeated incumbent Anglo Republican Talmadge Heflin in 2004 by only 32 votes. US-366 at 91 (Red-225 report); TrJ1343 (Vo). In 2006, Vo again defeated Heflin, but by almost 2000 votes. US-368 at 184 (Red-225 report). Vo again defeated Republican and Tea Party challengers in 2008 (by approximately 5,700 votes) and 2010 (by approximately 1,300 votes). Tr891 (Murray).

427. The coalition has supported and elected other local candidates (council members and school board members) as well. TrJ1348-49 (Vo); Joint Expert Ex-5 (Martin report). The minority communities work together to elect the candidate of choice. TrJ1346, TrJ1348 (Vo). The group votes for the issues of the district and the candidates who support their issues, and they collectively vote for the candidate of their choice. TrJ1348. Winkler testified that electing candidates of choice is not really based on political affiliation but more on common interests and because of Vo himself. Tr429. Vo was very involved with his constituent community and was supported by the Alief Super Neighborhood. TrJ1342-43 (Vo). Most Asians have voted for Vo over the years. TrJ1349.

428. On February 17, 2011, Hanna emailed Denise Davis with the subject "redist issues." D-192; US-102; Quesada-242. Regarding Harris County, he wrote, "Houston- Like last time Houston comes out to 24.41 seats. Many will want to round up again as LRB did but this caused legal issues w. county line rule. Politically popular w. Harris County but legally more risky. Should do 24 but this will mean the loss of another R seat since all D seats are minority.

(Hochberg has Hispanic seat)." At trial, Hanna said he made an initial, cursory review and that he made a mistake on the Hochberg seat (HD137) being a minority seat because it had an HVAP in the 60s (59.8% HVAP; 63.8% total Hispanic population). He testified that later he determined that the SSVR was in the 20s (22%), and he was not aware of a theory where that would be a protected seat, so his assessment changed. TrJ1185.

429. On February 18, Denise Davis forwarded Hanna's email to Interiano. D-132. Interiano responded to Davis stating, "Dave [Hanna] and I went through all of this yesterday afternoon and through some of the first things that we need to look at as soon as RedAppl is up and running. I also visited with Wayne Smith and Solomons and mentioned the issue about Houston and immediately both of them leaned towards keeping Harris County at 25 seats." *Id.*

430. Rep. Wayne Smith and/or his staff started working on Harris County plans in RedAppl around February 22. US-441. Smith's RedAppl plan log contains both 24-district and 25-district plans. *Id.*

431. On February 24, Solomons made a statement from the House front microphone that there would be 25 districts in Harris County. TrJ1295, TrJ1324 (Coleman); TrJ1652 (Hochberg); TrJ1931 (Bruce). Bruce said this caused the staff "a small panic attack" because that issue had not yet been decided, so they alerted Solomons to this fact when he came off the floor, and he told them to clarify it. TrJ1931. Solomons' office sent out a memo to members that same day clarifying that the decision about how many districts would be in the drop-in counties had not necessarily been decided. *Id.*; D-72. The memo stated, "The

numbers I provided on the House floor relating to the number of districts that will be wholly contained within the larger urban counties represent a preliminary calculation of the number of ideal districts each county could receive. Only after the committee takes testimony will we be able to consider the actual number of districts that each county receives. The members will have to determine this number based on legal standards governing one-person, one-vote and the Voting Rights Act, the requirements of the Texas Constitution, as well as the policy choices of the members. If you need any guidance on the criteria that a district must meet under state and federal law, as well as preclearance I would encourage you to ask either the redistricting staff or if you need to ask confidential questions please contact the redistricting attorneys in the Texas Legislative Council." D-72.

432. On March 7, Interiano emailed Hanna with the subject "Harris County." D-135; US-157. He asked if Hanna could meet with the Harris County GOP delegation on March 9, but he wanted to talk beforehand "to make sure that we are on the same page." D-135. Regarding the number of districtsthat Harris County would get in the House plan, Hanna wrote, "Arguments for 25: We've rounded up before. It fits within the 10% overall deviation. Harris County has a lot [of] votes in the legislature. You have to bring this claim in state court. Arguments for 24: 'As nearly as may be' means something, and one number only – not a range of numbers. Very safe from state lawsuit – putting the wrong number in Harris County is a catastrophic error if you guess wrong and requires all of Harris County and most of the rural parts of your map to be redrawn." *Id.* At trial, Hanna explained that

the risks were "fairly small on the substance," but if you were required to redraw from 25 to 24, it would require redrawing in Harris County and elsewhere in the state where the other new seat was awarded. TrJ1202.

433. Because Harris County was a drop-in county, members of the Harris County delegation were told to work together on a delegation plan. Alvarado decl. ¶ 6. Early in the process, Rep. Senfronia Thompson (African American, Democrat) and Rep. Wayne Smith (Anglo, Republican) worked together and with the delegation members to try to draw a 25-district plan. TrJ1266 (Thompson); TrJ1351 (Vo). Smith took the lead on working with Republican members and Thompson took the lead on working with Democrat members, and they tried to reach a consensus. TrJ1295 (Coleman); TrJ1241 (Thompson). Thompson testified that they started in mid-March to the beginning of April.[10] TrJ1266. She reached out to Democrats to see if they could get a consensus and

---

[10] In Rep. Wayne Smith's RedAppl plan 10 log, there is a plan dated 3/3/2011 with comments "started on 3/2/2011" and "Plan #17 with adjustments to 134 and 136 to make Woolley's district more Anglo." It also says 149/137 (24 members) SKK. US-441 at 5. Only an authorized user in Smith's account or the person who sent the plan to that account could have put that in the comments. This same comment is in the smlw plan account for plan H121 called "Redistricting Plan Bohac". US-441 at 6. There is also a plan with comments "Plan #18 with adjustments to keep vo/hochburg more hispanic" dated 3/4/2011. US-441 at 6. Given Rep. Thompson's testimony, it appears that Rep. Smith was not yet working with her on a delegation map at this time. In addition, Smith's map did not get adopted, and the evidence indicates that Smith's maps were not incorporated into the adopted plan. However, this is evidence that Harris County mapdrawers were focusing on race in drafting plans.

avoid the LRB and legal challenges. TrJ1266-67 (Thompson). Vo worked with surrounding members Murphy (HD133), Allen (HD131), Hochberg (HD137), and Miles (HD146). TrJ1350 (Vo); TrJ1652-53 (Hochberg).

434. Some Republicans (Jim Murphy and Dwayne Bohac) approached Rep. Woolley and asked if she knew that Smith was drawing maps. Woolley went to Speaker Straus, who confirmed that Smith had said he was drawing county maps, but that Straus had not put him in charge. Woolley hired Mike Hull (an attorney who worked for Associated Republicans and Texans for Lawsuit Reform) and Scott Sims to help draw a map. Woolley depo. at 12-13, 17. She thought all Republicans should be working together, and that the Republicans knew more about the west side than Smith did. Woolley depo. at 13-14. Led by Rep. Woolley, the Harris County Republican delegation independently worked with Mike Hull to draw their proposed map. TrJ1490, TrJ1577 (Interiano).

435. Around March 30, Smith sent Interiano a 25-member map of Harris County. D-313 (strjH212). The delegation did not reach consensus on Smith's map, although it was informally approved by a majority of the delegation. TrJ1268 (Thompson); Alvarado decl. (docket no. 331) at ¶ 7. The Smith/Thompson map was not introduced in the session. TrJ1268 (Thompson).

436. The thirteen Republican members of the Harris County delegation all signed off on a 24-district map, woolH111. D-234. This plan was dated March 31 and was provided to Downton/the HRC, and Solomons on March 31. D-234; PL-538; PL-1613. The Woolley map was drawn only by the Republican members of the delegation. Downton incorporated the Woolley 24-

district plan into his full state map on April 1. PL-538; Downton 8-31-11 depo. at 108; Tr931 (Downton).[11]

437. The Houston Republican delegation made the decision to pair Hochberg and Vo and eliminate HD149. Tr1482 (Interiano). The Republican delegation plan eliminated HD149, the multiethnic district in southwest Harris County, which was the part of the County that had experienced a lot of growth, but kept all four Anglo/Republican districts in East Harris County (HD127, HD128, HD129, HD144), which had experienced slower growth, despite the fact that all the growth in Harris County was attributable to minorities. Tr347-50 (Martin); Tr428 (Winkler); Tr809-10 (Turner); Tr892 (Murray). This pushed the other districts farther west in Harris County, with adverse impact on Latinos, African-Americans, and Asians, and eliminated HD149. Tr809-10; Tr892-93.

438. Solomons made the decision to go with 24 districts. TrJ1012, Tr1567 (Solomons). He based this decision on the County Line Rule and the "as nearly as may be" language in the Texas Constitution. TrJ1012, Tr1567-68. (Solomons). Solomons felt that giving Harris County 25 seats would be giving them an extra representative, and the rest of the State would not be properly represented. TrJ1568 (Solomons). Bruce said they discussed it with each other and with TLC and did some research and looked at legislative history. The Speaker's office also discussed it with their litigation team. Then Solomons made the decision to go with 24 districts. TrJ1933 (Bruce). But Solomons

---

[11] It appears from the plan logs that Woolley and the Republican delegation continued working on a 25-district plan as well. *E.g.*, US-432; US-441; PL-706.

had no role in deciding who would be paired; he left that and the map in general to the delegation. Tr1576, Tr1615-16 (Solomons).

439. Several representatives felt that the decision to go with 24 or 25 was not mandated by the Texas Constitution, but was a political question given past practice. Farrar depo. at 75; Smith depo. at 24-25. Hochberg did not think there was a need to go to 24 because the population of Harris County relative to that of the state changed very slightly. TrJ1653 (Hochberg). Martin also felt it was a policy choice to create only 24 districts. Joint Expert Ex-5 (Martin Report) at 5. Murray testified that the decision to go to 24 districts was "fishy" given what happened in 2001. Tr892. He opined that a 25-district map would have almost certainly resulted in a district in which Hispanic and Black voters would have had an opportunity to elect a candidate of their choice in the 2012 election. Joint Expert Ex. E-4 (Murray Report) at 27. Korbel also felt the decision was not justified by past practice and made it more difficult to draw an additional minority opportunity district in Harris County. Tr756-57.

440. Sometime around April 5 or 6, Coleman and others learned about the 24-district Woolley map drawn only by Republicans. TrJ1296-97, TrJ1299 (Coleman); TrJ1653 (Hochberg); TrJ1983-84 (Bruce).

441. Coleman testified that Woolley "inserted herself" and "took over" without discussion with the other members, and there was no formal designation for her to take responsibility. TrJ1298 (Coleman). Those working on the Woolley map did not discuss it with Coleman or other minority members of the delegation. TrJ1298-99 (Coleman). Coleman was

angry because the process was supposed to include all members in a particular delegation, and there was a discussion about it being an incumbent protection plan, but the Woolley map was not an incumbent protection map, nor did any of the minority members or any other members that were not Republicans have any comment on that map before it was given to Solomons. TrJ1299 (Coleman). Coleman had concerns about the proposal because it went to 24 districts and paired Hochberg and Vo. TrJ1299 (Coleman). Coleman felt that Vo and Hochberg represented districts that allowed minority voters an opportunity to elect their candidates of choice, and elimination of either district would reduce the number of districts of color protected under the VRA by one district. TrJ1300 (Coleman). On April 7, Coleman sent a memo to Woolley, Smith, Thompson, and copied Solomons and the other members of the Harris County delegation about the Harris County map expressing his concerns. US-266. No one responded directly to this letter. TrJ1302 (Coleman).

442. Hanna's first retrogression memo, written April 7, had concerns about Harris County. Hanna wrote,

> (11) While most of the performing Black districts in Harris County do not appear to have retrogression issues, the decline in District 147 in the proposed plan may be a problem. While three of the other Black districts (139, 141, 142) see increases in their Black populations over their current levels, the Black district with the lowest percentage of Black population (147) sees a decrease. This would appear to be a potential retrogression

issue. The solution would be to increase the Black percentage in District 147 so that it does not decline from current levels.

(12) Of the four performing Hispanic districts in Harris County, three appear to be in pretty good shape in the proposed plan. Only District 148 is dropping in its level of SSVR [from 39.4% to 34.2%]. Unfortunately this district is the lowest in SSVR already so there is a possible retrogression issue with District 148. Given that there is a sizable cushion in adjacent District 145 over 50% SSVR, it should be possible to restore District 148 to its current level of SSVR.

(13) This multiethnic district in Harris County [HD149] is eliminated. The "other" population is primarily Asian but represents different ethnic groups. If it can be determined that the district was a true minority coalition district, there could be a retrogression issue in its elimination but this would be a novel retrogression theory to apply where no single racial or ethnic group has more than a quarter of the VAP of the district.

Hanna testified at trial that he did not think HD149 was a protected district. TrJ1158. Interiano thought it was legal to pair Vo and Hochberg because it was simply a Democrat pairing and the districts were not protected. Tr1482. Because no single minority group was over 50% of the population or over 25% of the voting age population in HD149, mapdrawers felt it was legal to dismantle HD149 even though it was electing a minority member. Tr1009, TrJ2015, TrJ2142-43 (Downton); TrJ1194 (Hanna). Hanna

never performed election analyses to determine cohesiveness of the ethnic groups in that area. TrJ1194.

443. The Republican delegation had not paid very much attention to the Democratic districts, as far as VRA compliance. Tr931-32 (Downton). Downton made some "tweaks" to the Republican delegation map; he modified it to try to match benchmark numbers for the minority opportunity districts. He did not recall tweaking it to try to enhance Republican numbers. Downton 8-31-11 depo. (Joint Ex. J-62) at 99-100. Downton looked at the numbers, essentially the SSVR and the BVAP, and compared them to the baseline plan, and tried to keep the numbers about the same. Tr932 (Downton). The goal was to make sure the numbers did not decrease. *Id.*

444. In Hanna's second retrogression memo, Hanna no longer had concerns about HD147 and felt the performing African-American districts did not appear to have retrogression concerns, though he said that election analysis should be performed on HD131 and HD146 to ensure the slight BVAP declines did not affect ability to elect. He further noted that, of the four performing Hispanic districts, only HD148 was dropping in SSVR (total SSVR dropped from 39.4% to 38.6%, which was higher than in the plan Hanna previously reviewed) and there was "a minor possible retrogression issue with District 148." He again stated, "Given that there is a sizable cushion in adjacent District 145 over 50%, it should be possible to restore District 148 to its current level of SSVR." He added, "Consideration should also be given as to whether a fifth majority Hispanic district could be drawn in Harris County and whether such a district would be

required by Section 2 of the Voting Rights Act." D-327. With regard to HD137, he noted that one might assume that it was an effective Hispanic district given its total Hispanic population of 63.8% and HVAP of 59.8%, but explained that the high number of non-citizens in the district gave it an SSVR in the low 20s and "as such this is not currently a performing Hispanic district." D-327. He further wrote, "In any event the SSVR increases so there is little possibility of retrogression with this district." D-327. Hanna did not find potential retrogression issues regarding HD137 because the proposed district had a higher SSVR than the benchmark. TrJ1193 (Hanna). With regard to HD149, he again noted that "there could be a retrogression issue in its elimination but this would be a novel retrogression theory to apply where no single racial or ethnic group has more than a quarter of the VAP of the district." D-327.

445. Woolley's plan with Downton's changes was the first version of Harris County in Plan H113, released April 13. Tr931-32 (Downton); Tr1430, Tr1474, TrJ1609 (Interiano); TrJ1303 (Coleman). Other than the 25-district plan from Smith, Interiano does not remember getting a proposed map from the whole Harris County delegation, the Harris County democrats, or any member. TrJ1609, TrJ1611 (Interiano). In Plan H113, HD148 had a total SSVR of 38.6% and non-suspense SSVR of 39.4% and thus was not further increased in response to Hanna's second memo. HD149 was eliminated and moved to the Austin area. TrJ1352 (Vo).

446. The initial configuration of southwest Harris County in Plan H113 remained substantially unchanged in Plan H283. Before redistricting,

Hochberg's district HD137 did not go west of the Beltway. TrJ1658 (Hochberg). HD137 is elongated and extended westward into the current HD149, and incumbents Vo and Hochberg are paired. The concentrated Asian area that was formerly in HD149 is split, with most of it being placed in HD133 (an Anglo-controlled district) and the rest in HD137; the remaining minority population of benchmark HD149 is placed in HD131, represented by Allen (African American, Democrat). D-333; Tr351 (Martin). Adding the population from HD149 to HD137 makes HD137 less Hispanic (Hispanic VAP decreased by 4.4% from 59.8% to 55.5%). Tr352 (Martin). A substantial Asian-American community was removed from HD137 and placed in a predominantly African-American district, HD146. TrJ1658 (Hochberg).

447. Hochberg was more senior than Vo and was significantly more active and vocal in the opposition party than Vo, and Hochberg believed that past partisan practice was to target more senior members of the opposition party. TrJ1659, TrJ1661, TrJ1667 (Hochberg); TrJ1352-53 (Vo). However, rather than targeting Hochberg, the perception among members was that the redistricting favored Hochberg, who was Anglo, over Vo because minority population was reduced in the new HD137. TrJ1302 (Coleman); TrJ1660 (Hochberg); Hochberg Decl. (docket no. 331) at 3; Alvarado Decl. (docket no. 331) at 5. Hochberg was assured by his Anglo Republican colleagues that HD137 was drawn to give him a district in which he could win re-election and that he would be back. Hochberg Decl. (docket no. 331) at 4; TrJ1660 (Hochberg). This included Wayne Smith, Dan Huberty, and Ron Eissler. TrJ1675 (Hochberg). A

large portion of the new district was area that Hochberg had represented for ten years, and substantial Asian-American population that would have at least been perceived as friendly to Vo was removed. TrJ1660. Hochberg testified that the configuration of HD137 could not be justified on partisan grounds unless they were trying to create a solidly Democratic district. TrJ1661.

448. In Plan H283, the Alief community would have a tougher time supporting Vo and would not be able to elect its candidate of choice. TrJ1370 (Vo). Similarly, Vo would have a harder time being successfully re-elected because most of the district was new for him. TrJ1354-55 (Vo). Although both benchmark HD137 and HD149 were diverse and included Asian population, HD149 had more Asians (mostly Vietnamese) than HD137. TrJ1354 (Vo). When HD137 and HD149 were paired and HD149 eliminated, the new HD137 more closely resembled HD137 than HD149. TrJ1354. Vo believes he was targeted because what is left of HD149 is just a little section and he lost a lot of Asian population to other districts. TrJ1362 (Vo).

449. The Legislature did not pair Rep. Button (Republican), another Asian incumbent, in Dallas. TrJ1680 (Hochberg).

450. After seeing the map, Vo went to Solomons to ask why the map was drawn the way it was drawn. TrJ1355 (Vo). Solomons said to give his concerns to the committee staff. TrJ1356 (Vo). Vo submitted some changes to the new HD137 but did not hear back. Vo talked to Solomons and Straus, noting the inconsistency of rounding down to 24 districts. He talked to Harris County members of the HRC to try to

get them to understand that the new HD137 would be hard for him to run in. TrJ1356 (Vo). Vo stated that there was little time to organize and prepare for the hearings on Plan H113, though some members of the Asian community were able to testify. TrJ1357.

451. At the April 15 HRC hearing, Rogene Calvert testified against Plan H113 and the pairing of HD137 and HD149 in Harris County. D-595 at 181. She said Alief ISD was split among five districts and the Asian vote was diluted. *Id.* at 182. She testified that there was voter cohesion among the different minority groups in HD149. *Id.* at 185. David Nguyen also testified against the potential loss of Vo and to cohesion among all the minority groups. *Id.* at 190-92. Lilly Truong also testified against the proposed plan as it related to HD149, saying that it was important to the Asian community to continue to be able to elect Vo. *Id.* at 195-96. John Truong testified similarly, adding that the Asian vote would be divided up. *Id.* at 196. Barbara Quatro of Alief testified that they had hoped Alief would be represented by one district but instead it was now divided among four. *Id.* at 198. Lupe Martinez from Alief testified against dividing Alief. *Id.* at 199. Toi Phon also testified against the splitting of Alief. *Id.* at 200. Fred Bandera testified that they were bringing many minority groups together in HD149, and Vo had been helpful. He asked that Alief be kept together. *Id.* at 202. Nicole Trals also testified on behalf of Vo and keeping Alief and HD149 intact. *Id.* at 211-12.

452. In testifying against Plan H113 and in favor of the MALDEF Plan H115, Luis Figueroa of MALDEF complained about the loss of Latino opportunity district HD33 in Nueces County and stated, "we can

draw Section 2 compliant districts in West Texas, in the Valley, and increase populations in Houston [in] Representative Farrar's district [HD148] and in Lon Burnam's district [HD90 in Tarrant County] to create a clear Latino CVAP majority district." D-595 at 34. Figueroa stated, "[I]n HD148, which is currently represented by Representative Farrar, [SSVR] is also reduced whereas we are able to even out the population to increase Representative Farrar to make it a Latino majority district." D-595. In Plan H115, HD148 had 51.6% total SSVR, 52.6% non-suspense SSVR, and 55.4% HCVAP using 2005-2009 ACS data. Rep. Farrar, who represented HD148, disagreed with Figueroa's suggestion to increase the SSVR in her district because it already performed for Latinos. Farrar depo. at 40-41, 98.

453. At the April 17 HRC hearing, Hochberg testified in opposition to Plan H113. He disagreed with the decision to round Harris County down to 24 districts, noting that it was almost the same as in the previous census, when it was rounded up. He also stated that it had been rounded up for 40 years, which kept it closer to one-person, one-vote requirements throughout the decade due to its fast growth. He noted that the LRB in 2000 said it could be either 24 or 25, and it chose 25. He asserted that if there were in fact a rule to round down, then it had been violated in the past. He noted that the LRB also described HD137 as a minority district in its DOJ preclearance submission, when its HVAP was 50.6%.[12] He said it was

---

[12] The DOJ objection letter to the LRB's House plan stated that the State initially asserted in its preclearance submission that HD137 was a minority district that could offset the loss of a district, but also noted that "in the supplemental materials"

inconsistent to claim it as a minority district in 2000 for preclearance but deny it minority status in 2011, when its HVAP had increased to 59.8%. He also noted that the map split the Sharpstown community of interest, and he submitted letters in opposition. Hochberg testified before the committee about specific precincts that should be moved, but he did not offer any amendments because there was a limited amount of time. TrJ1668 (Hochberg). The only amendment he could have offered that would have fixed Harris County would bring a district back or substantially change Harris County, and he knew that would not be successful. TrJ1669 (Hochberg).

454. In Plan H113, HD148 was 38.6% total SSVR and 39.4% non-suspense SSVR, which was down slightly from the benchmark of 39.4% total and 40% non-suspense SSVR. Mapdrawers Downton and Interiano testified that they increased the SSVR in HD148 in Plan H153 to 49% total SSVR/50.2% non-suspense SSVR[13] (and 51.6% HCVAP) in order to respond to claims that the map reduced the number of SSVR-majority districts from benchmark and to offset the loss of SSVRmajority district HD33 in Nueces County. Tr932-33, TrJ2049, TrJ2141 (Downton); Tr1431 (Interiano).

---

provided by the State, "the State notified us that if any district should be considered as the replacement, District 80 in South Texas — not District 137 — should be the one which offsets the loss of a majority Hispanic district in Bexar County." D-326; PL-225.

[13] Although total SSVR was available to mapdrawers through reports, RedAppl displayed only non-suspense SSVR such that mapdrawers only increased the non-suspense SSVR above 50%.

455. Between Plan H113 and Plan H153, mapdrawers manipulated the population of numerous Harris County minority districts (HD148, HD139, HD141, HD142, HD143, and HD145) to increase the SSVR in HD148, but they did not alter the Anglo districts. They elongated HD148 to the southeast and shed its most northwest population into HD139 for the purpose of increasing its SSVR. Latino population was taken from HD143. HD145 (Alvarado), which was also a Latino district, was elongated to the northwest to take population from HD143 and HD148. Downton did not know if population included in the southern part now joined into HD148 shared community interests with the population included in the northern part of the district. Downton 8-31-11 depo. (Joint Ex. J-62) at 103. Similarly, all he knew about the community joined at the ends of HD145 was that they were all in Harris County and they were all "along the highway" (although they are not all, in fact, along the highway). *Id.* at 102. The Heights neighborhood was no longer completely in HD148, and the district was disjointed. Farrar depo. at 63-64. In addition, the mapdrawers were not concerned with whether the increase in SSVR actually improved Hispanic effectiveness in HD148. Downton agreed that the increase in SSVR did not enhance the ability of minority voters in the district to elect their candidate of choice. TrJ2050 (Downton). However, Downton testified that new Hispanic voters added into HD148 now had an opportunity to elect (though voters being moved from an existing Latino-opportunity district already had that). TrJ2150 (Downton). In addition, election returns do not indicate that increasing the SSVR actually made HD148 more effective for Latinos. Joint Expert Ex-5 (Martin Report) at 6.

456. On April 19, Plan H153 was voted out of the HRC. When the HRC adopted its committee substitute and voted to send it to the full House, it did not make changes in response to the concerns raised by Coleman and the other minority members of the delegation. TrJ1305 (Coleman).

457. Sometime between April 19 and April 26, there had been a discussion among members about whether the process had been fair, and some of the Harris County delegation had a meeting about how the map came about. TrJ1303-04 (Coleman). Coleman asked for the meeting. TrJ1304. Reps. Woolley, Callegari, Bohac, Alvarado, and Farrar also attended the meeting. *Id.* It was contentious. Coleman asked Woolley why she had done a separate Republican map, saying it was a violation of the process and was not in good faith in terms of the process they were supposed to follow. During the discussion, in the context of the issue of whether to have 25 or 24 districts, Woolley responded that "you all's districts are protected. Ours aren't." *Id.* Coleman testified that Woolley stated that 24 districts made their districts "stretch further in terms of the limited number of Anglo votes that there were." TrJ1304-05. Coleman felt it was very clear that she was talking about ethnicity and the VRA and how that applied to the districts in Harris County. TrJ1305. Coleman felt she was talking about racial minorities because only they would be protected under the VRA. TrJ1330. He stated to others at the meeting that the Hochberg/Vo pairing violated the VRA. TrJ1305.

458. In an April 22 email, Stacy Napier of the OAG sent racially polarized voting summaries for some of the proposed districts, including HD137, to Bruce. US-

190/190A; PL-1616. The attachment contained a spreadsheet consisting of ten elections for various districts. US-190/190A; TrJ1019 (Solomons). The spreadsheet contained a column identifying the minority preferred candidate. US-190A; TrJ1020 (Solomons). It provided an analysis of Plan H153 (committee substitute bill). US-190A; TrJ1022 (Solomons). Napier wrote, "Given the low turnout and Hispanic citizenship in districts 137 and 144, we didn't feel comfortable identifying a candidate of choice from the regressions, but 137 seems to have been strengthened for minority candidates whereas 144 appears to have been weakened." Bruce forwarded the email with the attachments to Downton, Interiano, and Solomons that same day. Interiano responded to Bruce and Downton saying, "Am I missing something ... both of the districts that Stacey mentions in her email are strengthened in that report that she sent when comparing plan 100 and 153." US-169 . Downton then responded and copied Solomons saying, "I believe 144 is Legler. The prevailing candidate in the district (the Republican) was strengthened. But I'm not sure the Republican was the choice of the Hispanic community – I don't think that district has ever been performing. US-176. Bruce responded to Napier saying, "Gerardo [Interiano] is saying SSVR was enhanced in district 144 from PLAN 150 so not sure how it regressed." US-131. Bruce then wrote Interiano, "Checking. We didn't talk about Legler's district [HD144]. Talked about Alvarado's district, Sly's district, Thompson's district and Vo and Hochberg's districts at the meeting. I asked her to send me a summary of the regression analysis of all of the minority districts whether performing or not." US-169. At 9:51 Bruce wrote Interiano, "I THINK she's saying

it was not performing because they couldn't identify a candidate of choice, but that it may have been weakened because of turnout (not registration). US-170. Interiano responded, "See I don't think that Leglers was ever a performing district specifically bc it's [sic] SSVR is so low... If they are arguing that it is then we improved it, at least based on what they sent." US-170. On April 25, Napier responded to Bruce, saying, "On District 144, my data shows that SSVR went from 31.54 in H100 to 28.80 in H153, which is what our analysis compares, so it does make some sense to me that there was less performance by the Hispanic population. However, that district is a solid R district which looks like it elected the Republican candidate in every general election we analyzed. I don't think 144 is a performing district for Hispanics." US-131. Bruce forwarded Napier's email to Interiano. US-131, US-177.

459. On April 22, Interiano emailed Hanna, "Also when you get a minute, will you look at the Woolley amendment that's been filed? This is to help S. Davis and they dropped Miles's district to 40.5% BVAP. I know they drop it but it doesn't bother me too much. Let me know what you think." US-172. Hanna replied, "It is a 7 point drop from benchmark. probably performs (as do 141 and 142 which are currently at this level) but this is a different part of town and I guess there is a chance that voters behave differently in that part of town. couldn't Miles shed some non-Black pop to boost numbers a bit? Coleman looks good in this version." *Id.* Interiano responded, "Well that's exactly the issue . . ." Hanna wrote, "Is there a way to accomplish what they want without dropping Miles so much?" *Id.*

460. On April 26, Calvert, Nina Perales of MALDEF, Dr. D.Z. Colfield of the NAACP Houston, and Mustaafa Tameez of TAARI wrote a letter to Solomons about HD149. US-267; TrJ1359 (Vo). They wrote, "The map voted out of committee, Plan H153 eliminates HD149, one of the most diverse and multi-ethnic areas in Harris County, if not the State of Texas. It has the largest concentration of Asian Americans in Harris County, as well as large percentages of Hispanic and African American populations. Plan H153 creates a new HD137 which includes some of the current 149 but breaks up the majority of it into 4 other districts. It in fact breaks up Alief, a neighborhood community of interest as well as home to a large number of Asian Americans. There is also the Alief Independent School District, International Management District and Alief Superneighborhood that will be split into 5 state districts. We would like to see HD149 reinstated and not be eliminated. This would allow Harris County to have 25 districts as currently exists and provide better representation of people with smaller districts. Southwest Harris County is one of the most populous areas. The plan as presented will be harmful to the diverse communities of interest coexisting in this area. We implore you to amend the plan to ensure the preservation of communities of interest." US-267. The HRC did not take any action to address these concerns. TrJ1359 (Vo).

461. At the April 27 floor debate, when Solomons laid out Plan H153, he said they had increased the SSVR in HD90 in Tarrant County and HD148 in Harris County (from Plan H113) at the request of MALDEF. D-13 at S100. In Plan H153, the SSVR of

HD148 was 49% total/50.2% non-suspense. Rep. Farrar asked why the map did not increase the number of effective minority opportunity districts given that 89% of the growth was minority. *Id.* at S111. Solomons said they increased the number of minority districts from 29 to 30 and "beefed up" a couple of districts, including Farrar's, for SSVR. *Id.* Solomons stated that a primary index they used was SSVR. *Id.*

462. Farrar pointed out that they did not need to increase the SSVR in her district HD148 because it was already electing Hispanic representatives. D-13 at S112.

463. Rep. Walle (Hispanic, Democrat) noted that Harris County had grown at the same rate as the state but was losing one seat, going from 25 to 24. D-13 at S124. He also noted that Anglo population declined in Harris County (by 82,000) (-5.7%) while minority population increased (Hispanic by 551,789; African-American by 134,564; Asian by 76,827), yet no new minority opportunity districts were created, an effective coalition district, HD149, was eliminated, and the HVAP in HD137 (Hochberg) was reduced by 4.4%. *Id.* Solomons stated that the Texas Constitution required them to round down and pointed out that in 2011 the House passed a map with 24 districts in Harris County, and it was the LRB that issued a map with 25 seats. Solomons stated that Reps. Coleman, Dutton, Farrar, Hochberg, Thompson, and Turner all voted for a 24-district map. *Id.* Solomons asserted that the 25-district aspect of the LRB plan was never challenged in court, so they did not know if it would have survived judicial scrutiny, but they did not want to take the legal risk. *Id.* at S125. Solomons stated that their legal team did not think HD137 or HD149 were

protected districts, though he recognized that there was disagreement on that. *Id.* Hochberg noted that he had previously testified before the HRC on April 17 (when Solomons was absent) that 2001 was not the first time the County had been rounded up and previously no one had said they could not. *Id.* at S126. Hochberg said, "We were even further from 25 in an earlier approved redistricting plan that passed muster with the courts. So I don't understand where you get the requirement that it has to go down." Solomons responded that there had not been a court challenge to resolve the issue, and the safer course was to round down. *Id.*

464. The Harris County Democrats said they were not happy with the way the Democratic districts within Harris County had been drawn. Tr933 (Downton). They felt shut out of the process. TrJ1258 (Thompson). Rep. Thompson had specific conversations with Interiano about what she wanted her district to look like before the first map was shown, and although he appeared to listen, her concerns did not seem to be considered in the map. TrJ1251, TrJ1275, TrJ1236-37 (Thompson). Turner testified that agreements that had been reached, such as an agreement he had with Rep. Harless (Anglo, Republican), were disregarded. Tr808 (Turner). Both African-American and Hispanic members in Harris County felt their districts were problematic, while the Anglo seats were in good shape. TrJ1239, TrJ1243, TrJ1254 (Thompson).

465. In addition, Coleman objected to Amendment 23 (Plan H191), Woolley's pre-filed amendment that made changes to the Harris County map Woolley originally proposed. TrJ1309, TrJ1334 (Coleman).

Woolley's amendment was filed after the contentious meeting with Coleman. TrJ1310 (Coleman). Coleman felt that Woolley's amendment targeted him in retaliation for his earlier complaints. Coleman thought the amendment gutted parts of his district, and it removed his district office and mother's house from his district. TrJ1306-07, TrJ1312 (Coleman). The Speaker's team, leadership, his Chief of Staff (Denise Davis), and Interiano went to Coleman's office and asked what changes he wanted to the amendment. Rep. Charlie Geren (Anglo Republican) and Rep. Branch (Anglo Republican) also spoke with the Speaker and said Woolley's amendment was inappropriate. TrJ1314 (Coleman). Rep. Miles said there were people working in Denise Davis's office to fix the map. Coleman, Turner, and others went to the Speaker's office.

466. At that point, they stopped the floor debate for about three hours for people to meet with the Harris County Democrats and try to get their input on changes to the map. Tr933 (Downton); Tr1430-31 (Interiano). Downton testified that the Democrat members were told to leave the Republican districts alone, to not drop the SSVR or BVAP of the respective districts, and to keep HD148 above 50% SSVR, but within those guidelines, they could draw their districts however they wanted. Tr933, Tr934 (Downton); Downton 8-31-11 depo.(Joint Ex. J-62) at 104-05. Rep. Farrar also stated that Republicans said, "once our districts are drawn, you can have whatever is left and you can draw them amongst yourselves." Farrar depo. at 30-31. She stated that the Democrats "were confined to only certain areas." *Id.* at 49-50. Rep. Turner testified that they were able to make some

minor adjustments, but no real substantive changes that would add to or restore minority districts or change the pairing of 137 and 149. Tr802-03. Alvarado stated that members were told they could not alter HD148 "nor could [they] alter the Anglo portions of the map." Alvarado Decl. (docket no. 331) at 7. To rebut this testimony, Interiano stated that members of the delegation "were never advised by House Redistricting staff that they could not alter any of the Republican and/or Anglo districts in the plan," and notes that the agreed amendments did alter some Republican districts. Interiano Decl. (docket no 370-2) at ¶ 5. The Court finds that the Democrat members were told they could not alter Republican districts, and one amendment to a Republican district was made with the consent of that member, as discussed below.

467. Turner's district HD139 would be taking in a lot of new area. Tr817 (Turner). Turner did not want the area that crosses 290 and the area toward and north of 45 and Beltway 8, and he also lost area in the southwest corner of 140. Tr938-39 (Downton). He shared his concerns with Interiano and Denise Davis. Tr817-18. His concerns involved how the district would grow/look in the future. Tr819. Turner thought he could still win his district but it would be harder for an African American coming after him. Tr820. Downton said they were concerned with retrogression if they reduced his BVAP, and could not accommodate him while getting HD148 above 50% and keeping HD140 where it was. Tr939.

468. The delegation reached an agreement (Plan H271) that was set out as Amendment 24 to Woolley's amendment. TrJ1315, TrJ1334 (Coleman). Everyone from the Harris County delegation supported the

changes. TrJ1316. Woolley laid out Amendment No. 23 to Harris County (H191), and Coleman Amendment No. 24 (H271) to that amendment, reflecting the changes made through negotiations among Harris County members. D-13 at S206; D-190 at 134-37. Woolley noted on the floor that "we all worked together in the back room." D-13 at S207. At Woolley's request, Coleman assured Woolley that his district, HD147, which went from 39.2% to 38.2% BVAP, was still an African-American opportunity district and was not retrogressed. *Id.* Woolley moved for adoption of Plan 191 as amended by Coleman's amendment Plan H271, and it was adopted, as amended. D-13 at S208. The amendment was acceptable to the author and not subject to a vote, but the whole House approved it. TrJ1336 (Coleman); Tr934 (Downton). The amendment did not remedy Coleman's prior concerns about 24 seats and pairing Vo and Hochberg, and that remained in the final map. TrJ1316 (Coleman).

469. Plan H271 (Amendments 23 and 24) made changes mostly to Democrat/minority districts, including HD131, HD137, HD139, HD140, HD141, HD143, HD145, HD146, HD147, and HD148, but also changed two Republican districts, HD134 (S. Davis) and HD136 (Woolley). However, the changes to Woolley's district were entirely due to Woolley's pre-filed amendment Plan H271, andthus were not the result of any compromise with Democrat members. Some changes to S. Davis's district are from Woolley's amendment, but further changes were made in Plan H271 that appear to be the result of compromise. HD137 lost some population to HD134, possibly at Hochberg's request. TrJ1359-61 (Vo). Changes were made to HD148 that did not lower its SSVR. Rep.

Farrar testified that she had to ask her colleagues for precincts that would "drop the white number and increase the Hispanic number," which she thought was a disservice to both groups of voters. Farrar 2014 depo. at 37. Changes to HD145 included narrowing a part of the district that created a bridge between the northwest and southeastern parts of the district, which Downton testified was done at the request of Democrats. Tr935 (Downton).

470. Later, Rep. Martinez Fischer laid forth Amendment No. 33 (H200) focusing on Harris County. Rep. Walle asserted that Plan H153 violated the VRA and Texas Constitution in Harris County, and the MALC plan remedied the issues. Walle stated that reducing the number of districts to 24 diluted minority representation in Harris County, and that Plan H153 packed existing Latino opportunity districts and failed to create any new Latino opportunity districts. D-13 at S230. Walle and Hochberg asserted that HD137 was a protected district. *Id.* at S231. Hochberg noted that the LRB had stated his district HD137 was a fifth majority HVAP district when submitting it for preclearance, but that it had not been treated as a protected district. *Id.* at S232. Hochberg pointed out that there was a VTD split that actually split an apartment complex and that the map cut the Sharpstown community of interest (this was fixed). *Id.* Walle complained about the loss of Vo's district and dilution of the Asian vote. *Id.* at S234. Vo and Walle discussed that HD149 was a majority-minority district, with about 20% Asians, 20% Hispanics, and 20% African Americans. Vo noted that witnesses had come to testify to support HD149, and hundreds of emails had been sent to the members of the HRC. *Id.* at S233. Solomons stated that he

believed the map was legal, that HD137 and HD149 were not protected districts, and moved to table. *Id.* at S234. Walle stated that "we were not informed that a 24 map was going to be submitted. Okay. That map was submitted to you without any of the other democratic members from Harris County being informed of such map. And that's the issue that many of us from Harris County have is that we were not informed that those maps had been submitted, signed off on, a 24 map. When we were trying to negotiate to get a 25 map. And for us, we take that very personally because one, you are eliminating Representative Hubert Vo and pairing him with Representative Hochberg. And at the same time packing the other Latino - other majority minority districts. So for us, the process wasn't clean for us." *Id.* at S235. Walle also asked why nearly every minority-majority district in Harris County was overpopulated, which Solomons did not answer. The amendment was tabled. D-13 at S236.

471. Alvarado set forth Amendment No. 37 (Plan H226), a statewide map that had 25 Harris County districts and "maximizes minority majority opportunity districts." D-13 at S245. She stated that it has 57 total districts where minority voters can elect a candidate of choice and created five new coalition districts. Alvarado pointed out that Harris County had been rounded up for "the last couple of decades." *Id.* She also stated that a good portion of the Harris County delegation did not have input into the first map that was drawn at 24, and that it was not member-driven. *Id.* Solomons moved to table, stating that the committee map was legal and increased the number of minoritymajority districts to 30, that there were 2 BVAP over 50% districts, and that other maps

broke county lines. *Id.* at S246. He also stated that the proposed map created 25 districts in violation of the Texas Constitution. The amendment was tabled. D-13 at S247.

472. Coleman offered Amendment 38 (Plan H232), his statewide plan. He said that minority population was responsible for over 100% of Harris County population growth because Anglo population decreased by over 82,000. He stated that Plan H232 would create an additional Latino opportunity district (HD138), an additional minority coalition district (HD132 that is 67.3% non-Anglo VAP), and preserve HD149 as an 80% non-Anglo district. The map would provide minority opportunity in 58% of the districts in a county that was 67% non-Anglo, compared to 46% in Plan H153. D-13 at S248; *see also* Joint Expert Ex. E-3 (Lichtman Report) at 9-14; Tr1230 (Lichtman).

473. Some time after Plan H271 was adopted, Rep. Thompson (African American, Democrat) wanted changes. Tr936 (Downton); Tr1475 (Interiano). Speaker Straus asked Interiano to go to back and work with her and every member that would be impacted. Tr1475. Both Republican and Democrat members were involved. Tr1430-31 (Interiano). Other members who were affected by the changes were included in her meeting with the Speaker's staff, including Harold Dutton (African American, Democrat) and Dan Huberty (Anglo, Republican), and they both agreed to changes that affected their districts. TrJ1276 (Thompson). There were also some precinct swaps with other members, including Walle. TrJ1277 (Thompson). Republican districts around Thompson's HD141 changed to accommodate her requests, including HD126 (Harless), HD127 (Huberty), HD128

(Smith), and HD150 (Riddle). Interiano Decl. (docket no. 370) ¶ 6; Tr936 (Downton); TrJ1258, TrJ1276 (Thompson). HD141 ended up above 50% BVAP, which made it the third such district in the state. Tr936. Thompson was "85% happy" with her district. TrJ1275 (Thompson). The agreed changes were proposed by Smith as Amendment 4 during third reading. Tr936.

474. On April 28, the House debated third reading. TrJ1947; D-190 at S846. Solomons noted that there were a few agreed-to amendments "that help make the bill better, and they'll be acceptable to the author, I believe." D-190 at S846. Smith (Anglo, Republican) proposed the amendment to several districts in Harris County (Plan H281, affecting 126, 127, 128, 139, 141, 142, 143, and 150, as agreed to by members working with Thompson), and it was adopted. D-190 at S846; D-53(4) (map). Just before final passage, Rep. Allen (African-American, Democrat) realized that her district office was left out of her district, so they drew a line with as little population as possible to connect her district (HD131) to her district office, and that caused the little island of HD131 in the middle of HD146. Tr937 (Downton). Allen offered the amendment (H282), and it was acceptable to the author. It was adopted. D-190 at S848; D-53(5) (map); TrJ1610 (Interiano).

475. While some improvements were made to minority districts during the process, minority members still were not happy with their districts, and they felt that the Anglo members were 100% satisfied with their districts while minorities were not. TrJ1253, TrJ1281 (Thompson). African-American legislators were not very successful in getting changes made to their districts in a way they wanted. TrJ1257

(Thompson). Plan H283 did not address concerns about the pairing of Vo and Hochberg and elimination of HD149 or the fragmentation of the Asian community. TrJ1361 (Vo). Coleman, Vo, and other minority members of the Harris County delegation did not support PlanH283. TrJ1317 (Coleman); TrJ1362 (Vo).

476. Sarah Winkler, a lay witness from Alief, testified that the new configuration essentially destroyed the coalition and that minority voters' voices would be lost. Tr427-28. She also thought there would be voter confusion. Tr427. Calvert testified that Plan H283 paired two districts that were very representative of the minority coalition, eliminating one, and that it also fractured the concentration of minorities in that area. Tr422.

477. Instead of reflecting the minority population growth, Plan H283 eliminates a minority coalition district, HD149, and does not create any new districts where minority voters can elect candidates of their choice. Tr339 (Martin); TrJ1438 (Korbel). Kousser opined that the only change that might be thought to have increased Latino representation between Plan H113 and Plan H283 was the increase in HCVAP/SSVR in HD148, but that "merely further packed a district in which Latino voters had been able to elect their candidates of choice for at least a generation." Joint Expert Ex. E-2 at 71. Martin opined that the benchmark had six African-American districts, five Hispanic districts, and HD149 that were electing minority candidates of choice; Plan H283 eliminated HD149, thus reducing the number of effective minority districts from twelve to eleven. Tr352 (Martin). Martin opined that the reduction in

minority opportunity in Harris County was the result of cracking and packing. Joint Expert Ex. E-5 (Martin Report) at 5-7.

478. Murray noted that it would seem logical to delete a district from the east side of the County, where the growth rate was only about 10%, but that did not happen. Joint Expert Ex. E-4 (Murray Report) at 27. Instead, he noted that the map moves some of the eastern Harris County Republican districts slightly west to pick up minority population. Specifically, HD127 shed some of its Anglo/Republican population to the south into HD128 (to shore it up) and extended westward into Spring, taking in high performing minority areas and diluting their vote among the Anglo majority. *Id.* at 28. He stated that HD129 also moved northwest to add racially mixed, heavily populated precincts, where they would be diluted by the Anglo majority. *Id.* at 27-28.

479. Martinez Fischer, Martin, and Murray also asserted that there was an effort to maintain Anglo voting strength at the expense of minorities in HD144 in eastern Harris County. Tr339 (Martin). Benchmark HD144, which was drawn in 2001 as a majority-Anglo district and was represented by Anglo Republican Legler, had an Anglo VAP of 36.3% and a Hispanic VAP of 50.3% (but only 31.5% total SSVR and 34.8% HCVAP using 2005-2009 ACS data). In 2008, Legler defeated Democrat Redmond by only 902 votes (51.15% to 48.85%), though he won with 59.45% of the vote in the 2010 Republican-tide year. Murray opined that, to prevent HD144 from becoming an opportunity district and to shore up the Anglo Republican incumbent, three predominantly Anglo precincts with a vote history of opposing minority-supported

candidates were added to HD144 from HD129, seven mixed-race majority precincts and one majority black precinct were removed from HD144, and the district was extended to the east north of the ship channel to pick up sizeable Hispanic areas, but not in sufficient voter numbers to threaten the Anglo incumbent. Joint Expert Ex-4 (Murray report) at 28.

480. In Plan H283, HD144 is underpopulated by 5,759 people (-3.44%), and its Anglo VAP is increased to 42.8% and Hispanic VAP decreased to 48.5%. Martin testified that HD144 picked up Anglo population and shed Latino population into HD145 and HD147, which were overpopulated, but retained enough Latino population that that population was not available to create additional minority districts. Tr340-42. Martin testified that Latino voting strength could be increased by putting the Latinos that were removed back in and not underpopulating the district. Tr341. Martin asserted that the map retrogressed HD144 by reducing the Hispanic VAP from 50.3% to 48.5% and reducing the BVAP by 2.6% (from 7.8% to 5.2%).

481. Martin further noted that, in Plan H283, both HD145 and HD148 are elongated for miles, with HD145 extending north and west of downtown Houston for the first time since the district was created to take core Heights precincts from HD148 and beyond that, all the way to the 610/290 interchange. HD145 stretches roughly 25 miles across the city. Tr342-43; Joint Expert Ex-5 (Martin Report) at 6. Martin further opined that putting the HD144 population into HD145 and overpopulating it, shoving it north and taking population that had been in HD148, as well as artificially packing HD148, had the

effect of preventing the creation of another minority opportunity district. Tr345 (Martin). HD148 has one of the lowest perimeter-to-area compactness scores (.099) in Plan H283. HD145 is the least compact using the area-to-smallest circle compactness measure. Giberson depo. at 47.

482. Martin opined that high-growth minority areas in west Harris County were cracked. Benchmark HD132 (Callegari (R)) was only 43.8% Anglo VAP and HD135 was only 38.8% Anglo VAP, reflecting an area of rapid minority growth in West Harris County along and west of State Highway 6, north of I-10 and south of 290. Martin asserted that neither district was yet effective for minority voters, but plans H232 and H287 (24-district plans) show that an effective majorityminority district can be drawn in the area, while instead the State split this minority growth area among three Anglo-controlled districts 132, 135, and 138. Joint Expert Ex. E-5 (Martin Report) at 7. Murray noted that HD133 elected Kristi Thibaut, a Democrat, in 2008, but she was defeated in 2010 during the "Tea Party tsunami." Joint Expert Ex. E-4 at 31. To shore up the Anglo Republican incumbent, minority precincts were moved from HD133 to HD137, and high turnout Anglo precincts were added. *Id.*

483. Murray opined that mapdrawers used the artificial 50% SSVR threshold to unnecessarily pack large Hispanic majorities into just four districts (HD140, HD143, HD145, and HD148), without a showing that a 50% SSVR majority was needed for the districts to be effective. Joint Expert Ex. E-4 (Murray report) at 29. He asserted that Hispanics are otherwise packed into African-American districts or diluted in Anglo-dominated districts. Thus, although Hispanics

are 41% of the Harris County population, they can elect their candidates of choice in only five districts of twenty-four districts (the four Latino SSVR majority districts and HD137, where they can be an effective part of a coalition district). *Id.* He also opined that African-American voters are packed into the existing African-American districts (131, 138, 141, 142, 146, & 147). *Id.*

484. Despite Hanna's second retrogression memo stating that "consideration should also be given as to whether a fifth majority Hispanic district could be drawn in Harris County" and whether it would be required by § 2 of the VRA, D-327, mapdrawers Downton and Interiano did not try to determine if an additional Hispanic opportunity district could be drawn in Harris County. Downton testified that "it may have been possible" to draw a new Hispanic opportunity district in Harris County. TrJ2051-52. He stated that they "definitely could have created another district with a sizable Hispanic population" but he was not sure if they could have created another Hispanic majority district, and it was not something he worked on. TrJ2052. He was not sure if anyone worked on one. TrJ2053. Interiano also did not work to see what else was possible because the delegation was working on it. Tr1450 (Interiano). Hanna was able to draw an additional minority opportunity district within Harris County, though doing so likely would not have been popular with the Harris County incumbents (Republicans would not like it because they would lose a Republican district and Democrats would not like it because their districts would be rearranged). TrJ1207, TrJ1217-18 (Hanna). However, he did not run any election analysis on such a district. TrJ1218.

485. Anglos make up only 33% of Harris County population, but would control 54% (13 of 24) of the House Districts in Plan H283. Joint Expert Ex. E-5 (Martin Report) at 5; TrJ1245 (Thompson).

486. It is possible to preserve HD148, HD137, and HD149 with only 24 districts and create an additional Latino opportunity district, as was done in the Court's interim plan H309. TrJ138. Plan H309 eliminated Woolley's district HD136 because she retired. Plan H309 creates an additional HCVAP-majority district HD144 in eastern Harris County. PL-689.

487. The Legislative Black Caucus introduced two House plans—H202 and H214. Tr803 (Turner). Plan H214 had 25 districts in Harris County and Plan H202 had 24. When Solomons' map came out, Harris County had 24 districts, so they proceeded with H202 and did not introduce Plan H214 as an amendment. Tr804 (Turner). Plan H202 was a 24-district map that eliminated HD144 (represented by Anglo Republican Legler). It maintained the three benchmark HCVAP majority districts HD140, HD143, and HD145. It also maintained the six African-American districts (though two districts are below 50% BCVAP—HD146 is 48.7% (+/- 1.7%) and HD147 is 48% (+/- 1.5%). It also maintained HD148 as 44.1% HCVAP, HD137 as a minority-majority coalition CVAP district, and HD149 as a majority-minority coalition CVAP district. Therefore, H202 maintained the same number of minority districts in Harris County as the benchmark based on demographics.

488. Plan H232 is a 24-district plan introduced by Coleman during second reading. It eliminates HD126, an Anglo/Republican district. This plan maintains the three benchmark HCVAP majority districts (HD131,

HD143, and HD145) and the six benchmark African-American districts (though BCVAP in HD147 is 49.3% (+/- 1.3%)). It maintains HD148 as a 42.3% HCVAP district and maintains HD137 and HD149 as multi-ethnic minority-majority CVAP districts. Both HD132 and HD135 are majority-minority VAP (HD132 is 32.7% Anglo VAP, and HD135 is 46.6% Anglo VAP), but neither district is a majority VAP for a single minority. Further, both districts are majority Anglo CVAP using 2005-2009 ACS data: HD132 is 50.1% Anglo CVAP (and thus would probably not be majority Anglo CVAP using 2008-2012 ACS data), and HD135 is 59.2% Anglo CVAP. *See also* Joint Expert Ex. E-3 (Lichtman Report) at 9-14.

489. Plan H286 is LULAC's proposed *Gingles* 24-district Harris County map. LULAC-12-2A. It has four HCVAP-majority districts (HD1, 2, 3, & 4), and two of those are SSVR-majority districts (HD1 & 3). It has four districts that appear to be African-American districts, with BVAP of 39.4% (HD7), 48% (HD10), 56% (HD12), and 40.2% (HD13). Two of those (HD10 & 12) are BCVAPmajority districts. HD5 is 31.9% BVAP but 45.2% BCVAP (so it would be either an African-American district or a minority-coalition district (it is 33.1% HCVAP and only 17.9% Anglo CVAP). Four additional districts are majority-minority CVAP coalition districts (HD6, with 47.4% Anglo CVAP; HD9, with 36% Anglo CVAP; HD14, with 47.6% Anglo CVAP; and HD16, with 28.2% Anglo CVAP).

490. The Perez Plaintiffs offered Plan H287 (24 districts) for Harris County with 1.81% deviation that remedied the pairing of Hochberg and Vo, preserved all existing minority districts, and added two additional minority coalition districts. Joint Expert

Ex-5 (Martin report) at 7; Tr357-61 (Martin); Perez-113. HD126, an Anglo/Republican district, is eliminated and HD149 is retained. Martin testified that by taking out the overpopulation of districts in the Alief area, HD149 could be re-created, and by fixing deviations and cracking, two more minority opportunity districts—HD132 and HD138—could be created. Tr360-61. Plan H287 maintains the three HCVAP-majority districts from the benchmark—HD140, HD143, and HD145. It also maintains the six BVAP districts (one of the districts, HD147, drops slightly below 50% BCVAP at 49.5%, but the margin of error is 1.3%, and in any event the mapdrawers were only looking at BVAP for African-American districts). HD148 (Farrar) is a majority-minority CVAP district (Anglo CVAP is 43%), but not a majority-HCVAP district (HCVAP is 43.5%). HD137 and HD149 are maintained as majority-minority CVAP coalition districts. And HD132 and HD138 are added as majority-minority CVAP coalition districts. HD132 is 31.6% Anglo VAP and 49.8% Anglo CVAP using 2005-2009 ACS data. No single minority group is over 50% CVAP, so this would be a coalition district. Similarly, HD138 is 47% Anglo CVAP using 2005-2009 ACS data, while HCVAP is 35.9% and BCVAP is 12.5%. Martin testified this map was much more reflective of the demographics of the County and recognized the substantial minority population growth. Tr362.

491. Demonstration plan H205 (Martinez Fischer statewide substitute) would create 25 districts in Harris County. V. Gonzales depo. at 33-34, 40. With 25 districts, sufficient Latino population remained in HD144 to make it a new HCVAP-majority district. Alvarado Decl. (docket no. 331) at 5; Hochberg Decl.

(docket no. 331) at 3. It has four HCVAP-majority districts using 2005-2009 ACS data: HD140 (55.7%); HD143 (52.6%); HD144 (53%); and HD145 (53.8%). These districts also have non-suspense SSVR over 50%. HD144 in Plan H205 is a compact majority-HCVAP district. HD148 is 35.7% non-suspense SSVR, 41.1% HCVAP using 2005-2009 ACS data, and 54.6% HVAP. H205 has two BCVAP-majority districts (HD139, 59.8% and HD147, 58%) and four additional districts with BCVAP in the 40s (HD131, 47.5%; HD141, 49.2%; HD142, 44.8%; and HD146, 44%). H205 has five districts with BVAP over 40%: HD131 (41.4%; HD139 (49.1%); HD141 (43.2%); HD142 (40.3%); and HD147 (50.8%)) and one district with BVAP of 36.4% (HD146). HD137 and HD149 are maintained as majority-minority CVAP coalition districts (HD137 is 33.1% Anglo CVAP, and HD149 is 28.2% Anglo CVAP) and B+CVAP in these districts is greater than 50%. Three additional districts (HD133, HD136, and HD138) are majority-minority CVAP, but H+BCVAP is less than 50%.

492. Plan H214 was a Legislative Black Caucus statewide substitute plan with 25 districts in Harris County. It maintained the three HCVAP/SSVR majority districts, 140, 143, and 145. It maintained the six African-American districts, though HD146 and HD147 fell slightly below 50% BCVAP. It maintained HD137 as a majority-minority CVAP district (Anglo CVAP 34.4%) and maintained HD149 as a majority-minority coalition district (Anglo CVAP 23.4%). It did not create any new minority opportunity districts.

493. MALC offered Plan H295, which created HD144 in Harris County with 51.4% SSVR.

494. The population deviation of Harris County in Plan H283 is 9.74%. Tr356 (Martin). Martin testified that it was easy to draw a plan with a deviation of only 1.81%. Tr357.

495. Alvarado noted that three of four Latino-majority districts (HD140 (1.85%), HD145 (1.9%), and HD148 (4.59%)) were overpopulated, and four of six African-American districts (HD131, HD139 (4.83%), HD146 (4.09%), and HD147 (4.91%)) were overpopulated. Alvarado decl. (docket no. 331) at ¶ 11a. She opined that this uses up minority population unnecessarily and limits the ability to draw new districts. Alvarado Decl. (docket no. 331) at 5; Hochberg Decl. (docket no. 331) at 3.

496. One would expect Harris County districts to be overpopulated compared to the statewide ideal because there was enough population for 24.41 districts. Because the Legislature chose to go with 24 districts, there was enough population to have all districts be at ideal population or above. However, six districts (three Anglo Republican and three Democrat) were underpopulated. All other districts were overpopulated. HD147, an African-American district, is the most overpopulated district in Harris County (4.91%). And HD142, also an African-American district, is the most underpopulated district in Harris County (-4.83%). Dr. Arrington noted that minority districts in Harris County were drawn with larger populations than the Anglo Republican districts. US-356 (Arrington report) at 28. The overpopulated Anglo Republican districts are populated as follows compared to the statewide ideal: .97, .55, 2.45, 4.71, 3.18, 3.22, 4.05, 2.85, 3.23, .65. The overpopulated minority districts are populated as follows compared

to the statewide ideal: 4.53, 3.56, 4.83, 1.85, 1.9, 4.09, 4.91, 4.59.

497. Interiano stated that, given the choice to have 24 districts in Harris County, the ideal population size for a district in the County was 170,519, slightly higher than the ideal state district size (167,637). Interiano Decl. (docket no. 370-2) at ¶ 2. He stated, for example, that HD140 and HD145 are populated at 170,732 and 170,821, respectively, which is almost the ideal county size, but several thousand above ideal state size. Interiano stated, "This overpopulation is due to the fact that Harris County was awarded twenty-four districts, not in order to avoid drawing an additional minority opportunity district. With that said, there were several instances where it was necessary to increase the population of a particular district either because a member specifically requested to have certain precincts and was unwilling to give up other populations or because the population was needed in order to maintain certain benchmarks, like the 50% Spanish Surname Voter Registration (SSVR) for Latinos or the existing levels of African-American voting age population." Interiano Decl. (docket no. 370-2).

498. In Harris County, Bill White got 50.23% and Obama got 50.44% of the vote. Tr337(Martin).

499. Arrington testified that coalition districts are effective districts in the sense that one or more of the racial groups in coalition have an ability to elect their first choice candidate in the district, even if they oppose each other in the primary, though he found no evidence of that in HD149. TrJ135-36 (Arrington).

500. Dr. Engstrom (Joint Expert Ex. E-7) found that Latino voters are highly cohesive in support of Latino candidates with Democratic primary nominations in the general election. All five of such candidates received strong support (75-83%). The only Republican Latino in the general election, Eva Guzman, did not. All Latino candidates in Democratic primaries also received Latino support (78.1% bivariate and 59-87.8% multivariate). Latinos voting in Republican primaries also supported the Latino running for Railroad Commissioner but not for Governor. While non-Latino voters overall did not provide majority support for the two Latino candidates endorsed by the Democratic party in the 2008 election, they did provide all three such candidates with slight majorities in 2010, though it appears to be a function of very high African-American support for these candidates (98% of their vote, whereas other voters ranged from 15 to 24.7%) The only Latino Republican received a slight majority of support from non-Latino voters overall, but multivariate showed African-American support was less than 2% while others was 81.1%. Non-Latino voters in Harris County provided a slight majority of their votes to just one of the Latino candidates seeking the nomination in the Democratic primary. In the multivariate analysis, African Americans provided a majority of their votes to two of the Latino candidates favored by Latinos, while the other voters provided majorities of their votes to only one. In Republican primaries, African Americans and Latinos supported the incumbent candidate for Railroad Commissioner, while others did not, and neither favored the Latino candidate for Governor. The analysis reveals that Latinos are very cohesive in their candidate preference for Democratic Latino

candidates in general elections and that is shared by African Americans in these elections, but not other voters. The analyses of the Democratic primary elections show Latinos to be likewise cohesive in their preferences for Latinos, but this preference was not generally shared by the rest of the primary voters.

501. In his corrected rebuttal report (docket no. 307-1), Dr. Engstrom found racially polarized voting in Harris County. In general elections, Latinos were very cohesive in their support for Latino candidates with the Democratic party nomination, and that preference was shared by African Americans but not by other voters, whose support did not exceed 30%. Latinos are also very cohesive in their support for Latino candidates in the Democratic primaries, but these preferences are not usually shared by non-Latinos, and African Americans were least likely to share the preference.

502. Data from 2008 and 2010 in Harris County show "almost zero black voting in the Republican Primaries, and very, very little Hispanic participation." Joint Expert Ex. E-4 (Murray Report) at 19.

503. Plaintiffs provided lay testimony of tri-ethnic cohesion. Sarah Winkler provided lay testimony that the minority coalition in Alief is able to elect candidates of choice to the Texas House in HD137 and HD149. Tr426. Rep. Turner testified that Asians, Latinos, and African Americans have worked together to pick someone of their choice in HD137 and HD149. Tr827. Rep. Thompson testified that, in Harris County, African Americans, Latinos, and Asians work in cooperation together politically. TrJ1256. Thompson, who is African American, is supported by

the Latino community and has supported many in the Latino community. *Id.*

504. 48.1% of Hispanics in Harris County lack a high school education, compared to 22.6% of the total population of Harris County. Joint Expert Ex. E-1 (Chapa Report) Table 4. The median household income for Hispanics is $37,520, compared to $50,567 for the total population of the County. *Id.* Table 5. Per capita income for Hispanics was $14,103, while for non-Hispanic Anglos it was $43,902. *Id.* 31.42% of Hispanic children live in poverty, compared to 7.08% of non-Hispanic Anglo children. Joint Expert Ex. E-9 (Gonzalez-Baker Report) Table 8.

505. Murray noted that the King Street Patriots, a Tea Party affiliate, used "ballot security" programs in Houston aimed at suppressing African-American and Hispanic voting in October and November 2010. Joint Expert Ex. E-4 (Murray Report) at 17. They monitored early and in-person voting at Harris County polling places in minority neighborhoods, and there were a number of confrontations with voters and election officials at minority polling places. *Id.*[14] Murray also noted that the Harris County Tax Assessor-Collector and Registrar of Voters Paul Bettencourt used his position in 2008 to slow the rise in voter registrations that year among younger, mostly minority applicants by rejecting thousands of applications for minor errors and creating a backlog of unprocessed voter registration cards. These actions resulted in a lawsuit alleging violations of the VRA. *Id.*

---

[14] Congresswoman Sheila Jackson Lee also testified about the King Street Patriots engaging in voter intimidation in minority areas. Tr1533, Tr1536 (Jackson Lee).

506. The Harris County map was drawn primarily by the Anglo Republican members of the delegation (and their mapdrawer) without any input from minorities or Democrats. Downton made some changes to their map to try to match benchmark numbers for the minority districts, and he used race to do so. During second reading, Democrats were able to make some changes to the map within limitations placed upon them, including that they could not alter the Republican districts. Rep. Thompson was able to get further negotiated changes to the map that were agreed upon by some Republican members.

507. Because Harris County went from 25 to 24, one district was eliminated, and the Harris County Republican delegation chose to pair Hochberg and Vo and eliminate Vo's district HD149. HD149 was a multi-ethnic district that had been electing Vo, the first Vietnamese-American representative, since 2004. The pairing was viewed as favoring Hochberg, an Anglo, over Vo. Because no single minority group was over 50% HCVAP or VAP, mapdrawers took the position that the district was not protected.

508. Plan H283 eliminated HD149 and did not create any new minority ability districts despite the fact that all the growth in Harris County was due to minorities. Mapdrawers increased the SSVR of HD148, a district that was already strongly performing for Latinos, above 50% in order to offset the loss of an SSVR-majority district in Nueces County, and claimed it was a new Latino opportunity district. Mapdrawers did not look at and were not concerned with whether this increase improved Latino electoral ability in HD148; they increased the Hispanic

population solely to bring the district above 50% SSVR.

509. HD144, which had become 50.3% HVAP, was reconfigured to protect the Anglo Republican incumbent, resulting in a district that was underpopulated and was 48.5% HVAP.

510. Representatives from the Asian community in southwest Harris County testified repeatedly that they wanted to be kept together in a district, but the Asian community was split among several districts in Plan H283.

Fort Bend County

511. In Plan H100, HD26 and HD27 are wholly contained within Fort Bend County, with the remainder of Fort Bend County being connected in HD28 with Waller County and Wharton County.

512. HD26 was 39.4% Anglo in terms of total population, 41.9% Anglo VAP, and 53.5% Anglo CVAP using 2005-2009 ACS data (but only 48.2% Anglo CVAP using 2008-2012 ACS data). HD26 was represented by Rep. Howard, an Anglo Republican.

513. HD27 was 25.1% Anglo in terms of total population, 27.5% Anglo VAP, and 34.5% Anglo CVAP (using 2005-2009 ACS data). Its BCVAP was 36.4% and its HCVAP was 23.2%. Red-106 Report. HD27 was represented by Rep. Reynolds, an African-American Democrat.

514. HD28 was 46.6% Anglo in terms of total population, 41.9% Anglo VAP, and 59% Anglo CVAP using 2005-2009 ACS data. HD28 was represented by Rep. Zerwas, an Anglo Republican.

515. In 2010, Fort Bend County was 36.2% Anglo (and 38.7% Anglo VAP). D-58. Fort Bend County has a substantial Asian-American population. TrJ1454 (Korbel).

516. Fort Bend County was one of the suburban areas with high population growth, warranting a new district in the area. TrJ1535 (Interiano). Fort Bend County was not a drop-in county because there was spillover. TrJ1603 (Interiano). Due to the growth in Fort Bend County, it went from two districts with spillover population to three districts with spillover population, and the Legislature placed new HD85 there.

517. Interiano worked with the three incumbent delegation members because it was not a drop-in county. The delegation members had to work together to create their districts within the confines of the county, and Interiano had to provide constant feedback on how many counties and which ones they would be pulling in to join with the spillover population. TrJ1603 (Interiano). The mapdrawers could have combined the spillover with two, three, or four counties, and that would have an impact across the rest of the map. The location of the incumbents' homes was a constraint on drawing the districts. Rep. Reynolds lives in the southern part of HD27 but wanted population located to the north. TrJ1604 (Interiano). Reynolds also lives in a very Republican part of the city and he wanted to make sure that the community that he lived in stayed entirely together. TrJ1605 (Interiano). Putting Reynolds in the new HD85 would not have given him a chance to be re-elected. TrJ1606 (Interiano). They also tried to keep the districts similar in size; they were on the low end

because they "ultimately ended up pairing the spillover from Fort Bend County with only 2 counties," so they needed the spillover population from Fort Bend County to be higher. All members of the Fort Bend County delegation agreed to the configuration. TrJ1608 (Interiano); D-229 at 51, 98, 120.

518. The delegation-agreed map was put into Plan H113, the first public map. The configuration of the Fort Bend County districts did not change, and thus were the same in the enacted Plan H283. In Plan H113 and Plan H283, HD26, HD27, and HD28 are wholly within Fort Bend County, and the remainder of Fort Bend County is joined in HD85 with Wharton and Jackson Counties.

519. At the April 15 HRC hearing, Rogene Calvert of the Texas Asian American Redistricting Initiative complained about the proposed configuration of HD26 in Fort Bend County, which had one of the largest Asian-American populations, stating that they had hoped for two more compact districts to protect their strength. D-595 at 184. She had also testified at the Houston field hearing on November 20, 2010 about the Asian population in Harris County and Fort Bend County, and had asked that the Asian community be kept together. D-117; US-461 at 3.

520. During the April 27 floor debate, Rep. Walle (Hispanic Democrat from Harris County) proposed an amendment (Plan H172) that would have created an Asian, Latino, and African-American coalition district based in Sugar Land. D-13 at S174, S176. This plan left HD27 the same as in the committee plan but changed the configuration of HD26, HD28, and HD85. Walle said that the proposed amendment would put over 30% "other" population (Asian Americans) into

HD26, and it would be a coalition district with an opportunity for Asians to reflect the Asian population growth in Fort Bend County. Walle contended that the growing Asian population in Fort Bend County needed representation. D-13 at S177-78. He stated the committee map was convoluted and violated the city boundaries; it split precincts, fractured the City of Sugar Land, and diluted Asian voting power in Fort Bend County. *Id.* at S174. Rep. Howard (Anglo Republican), who represented HD26, noted that the members of the area had agreed on the plan, that much of the Asian community was concentrated in his district, and that he felt he had adequately represented them and that they had "overwhelmingly voted" for him. *Id.* at S177. Walle argued that Asians needed representation and that it was also wrong to eliminate Vo's district HD149 in Harris County. *Id.* at S176. The amendment was tabled. *Id.* at S178.

521. Rep. Turner (African American, Democrat) proposed Plan H202 during the April 27 floor debate. It placed HD26, HD27, and H28 wholly inside Fort Bend County, and joined the surplus with Waller County and Washington County in HD13. HD26 (Fort Bend County) in H202 is 12.9% HCVAP, 14.5% BCVAP, 23.8% Asian CVAP, and is majority-minority CVAP using 2005-2009 ACS. Tr841-42 (Fairfax); Joint Map Ex. J-25. This would be a tri-ethnic coalition district.

522. Rep. Coleman (African American, Democrat) proposed Plan H232. He said that Fort Bend County was 62% non-Anglo and his substitute created a 70% non-Anglo coalition district HD28 in addition to African-American HD27 (with 43.9% BCVAP). D-13 at S248. This map kept HD26, HD27, and HD28 wholly

within Fort Bend County, and joined the excess Fort Bend population with Waller County and Wharton County in HD126. HD28 was 40.4% Anglo CVAP, and majority-minority HCVAP (25% HCVAP, 19.9% BCVAP, and 13.7% Asian CVAP). This would be a triethnic coalition district. *See also* Joint Expert Ex. E-3 (Lichtman Report) at 9-14; Tr1230 (Lichtman).

523. As noted, no amendments were adopted or changes made to the Fort Bend County districts. In Plan H283, HD26 is 57.3% Anglo CVAP; HD27 is 30.8% Anglo CVAP; HD28 is 58.9% Anglo CVAP, and HD85 is 52.5% Anglo CVAP using 2005-2009 ACS data.

524. Using 2008-2010 ACS data, HD27 had a combined B+HCVAP of 62% and Anglo CVAP of 26.8%. TrJ1420 (Korbel); D-109. BCVAP alone is 46.4%. HD85 is 42.9% H+BCVAP and 49.4% Anglo CVAP (+/- 1.2%). HD26 is 51.8% Anglo CVAP and HD28 is 55.2% HCVAP. D-109. Korbel testified that HD27 is a minority opportunity district but the other districts are not. TrJ1417.

525. Martin noted that Fort Bend County is only 38% Anglo in terms of voting age population, but in Plan H283, Anglo voters would control 71% of the 3.5 districts in Fort Bend County. Joint Expert Ex. E-5 (Martin Report) at 12. Relying on racial shading maps by VTD, he opined that this partisan gerrymander was achieved by splitting the minority community outside the African-American opportunity district HD27 among Districts 26, 28, and 85 (which extends into neighboring rural counties). *Id.* Korbel testified that HD27 is packed with minorities and the remaining minority population is cracked among the other districts that will not provide minority opportunity.

TrJ1417. The Legislature spread the minority population of Fort Bend County into four districts. TrJ1416 (Korbel).

526. Korbel testified that HD26 is an odd-shaped district that does not appear to follow traditional redistricting principles of compactness and respecting communities of interest. TrJ1413-14. However, his report did not provide information about factors such as rivers, city boundaries, roads, or political data that might account for district boundaries. TrJ1455 (Korbel). Interiano testified that the HD26 lines partly track precinct lines and natural boundaries, and also reflect the goal of trying to keep a balance of Republican strength between HD26 and 28. TrJ1607.

527. The population growth in Fort Bend, Wharton, and Jackson Counties was 80% minority. TrJ1411 (Korbel). Asian, Hispanic, and African-American growth all exceeded Anglo growth, and there was sufficient total minority population growth in Fort Bend County to populate a new district. MALC-154; Joint Expert Ex. E-5 (Martin Report) at 12; Joint Expert Ex. E-4 (Murray Report) at 29. The growth meant the Legislature created a new district there, and although there were roughly 140,000 more minorities added to the area than Anglos, no minority opportunity district was created. TrJ1411-12 (Korbel); Joint Ex-5 (Martin Report) at 12; Joint Expert Ex. E-4 (Murray Report) at 29. Martin opined that the Legislature failed to draw an additional coalition district in Fort Bend County even though one could have been drawn. Tr404 (Martin). Interiano testified that the mapdrawers looked at whether to put a new minority opportunity district in Fort Bend but decided not to because it would have been a coalition district,

and they did not feel that § 2 required it. TrJ1571, TrA66 (Interiano). The mapdrawers also did not believe they had an obligation to provide an opportunity for minority growth; instead they chose to draw the districts to keep them Republican throughout the decade. TrA67 (Interiano).

528. The Perez Plaintiff's *Gingles* demonstration plan H290 is a three-district plan. Joint Map Ex. J-35. It contains an African-American district (HD27) (44.3% BCVAP) and a proposed tri-ethnic minority coalition district (HD28) with an Anglo VAP of 25.5% and a B+HVAP of 52.7%, and "other" (Asian) VAP of 21.7%. HD28 would have an Anglo CVAP of only 36.2% and 26.3% HCVAP, 21.8% BCVAP, and 14.7% Asian CVAP, and would be a tri-ethnic coalition. Joint Expert Ex. E-5 (Martin Report) at 12.

529. MALC offers *Gingles* plan H329 that would create two minority districts. MALC-126. Using 2008-2012 ACS data, HD27 is 30.3% Anglo CVAP (45.6% BCVAP, 15.9% HCVAP, and 7.3% Asian CVAP), and HD26 is 37.8% Anglo CVAP (16.5% BCVAP, 13.6% HCVAP, and 30.8% Asian CVAP). MALC-128. HD28 and HD85 are majority-Anglo CVAP.

530. MALC also offers *Gingles* demonstration map H361 (H366 is the same), a plug-in map that MALC contends creates two minority opportunity districts, HD27 and HD85 (a tri-ethnic coalition district). TrJ1418, TrJ1421 (Korbel); MALC-131. HD27 is similar to that in H283; HD26 encompasses Sugar Land and areas to the south; HD85 encompasses Rosenberg and Richmond and extends southwest, and HD28 includes the rest of Fort Bend and Wharton County and all of Jackson County. TrJ1418. In this map, HD27 is 65% B+H in total population and HD85

is 59.9% B+H in total population, and both are over 12% in "other" (Asian) population. TrJ1419-20 (Korbel). Using 2008-2012 ACS data, HD27 has 25.4%Anglo CVAP and 64.2% B+HCVAP, and HD85 has 34.1% Anglo CVAP and 54.3% B+HCVAP. TrJ1421 (Korbel). With Asian 10.8% CVAP included, it is over 64% minority CVAP. TrJ1421. Korbel testified that this area has a tri-ethnic coalition and that there are no significant compactness differences between H283 and H361. TrJ1421-22 (Korbel). This would be a minority coalition district. TrJ1455 (Korbel).

531. LULAC offers Plan H285, a four-district plug-in *Gingles* demonstration map for Fort Bend County with 1.94% deviation. LULAC 12-2-B; Joint Map Ex. J-30; Tr699 (Korbel). HD27 is the same as in Plans H361 and H366, and the remaining districts are similar but not identical. Thus, HD27 is 47.4% BCVAP, and HD85 is a coalition district (28.8% HCVAP, 23% BCVAP, and 8.8% Asian CVAP). HD26 and HD28 remain Anglo-majority CVAP.

532. Rep. Senfronia Thompson (African American, Democrat) is familiar with Fort Bend County politically and personally. TrJ1246 (Thompson). She has observed cooperation between African Americans, Latinos, and Asians in Fort Bend County, and she thinks there should be an Asian coalition district there. *Id.* She testified that African Americans and Latinos vote with Asians in that area. *Id.*

533. Dr. Brischetto found a high degree of racially polarized voting in Fort Bend County. TrJ969. Dr. Brischetto found racial bloc voting in general elections in Fort Bend County. TrJ947, TrJ969; MALC-161. He found that Latinos had a very high cohesiveness.

TrJ969. He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.* Brischetto found that African Americans, Asians, and Latinos were very cohesive in Fort Bend County in the general elections. TrJ970. He did not conduct a multivariate analysis for the primary elections in Fort Bend County. TrJ978-79; TrJ1866 (Alford).

534. Based on his analysis of the expert reports in this case, Dr. Alford did not find any evidence of cohesion among Asian-American, Black, and Hispanic voters in primary elections in Fort Bend County. TrJ1866 (Alford). He testified that no expert has done a multivariate analysis for Anglo, Asian, Black, and Hispanic voters in primary elections in Bell or Fort Bend Counties. TrJ1866. He stated that there was no evidence of cohesion among Asian Americans, Black, and Hispanic voters in primary elections in Bell or Fort Bend County, and unless their behavior there is remarkably different from what is seen everywhere else in the state, they would not vote cohesively. TrJ1866-67. He thinks there is neither political cohesion nor electoral voter cohesion. TrJ1867. His conclusion about lack of evidence of cohesion in Bell and Fort Bend does not take into account lay witness testimony about minority cohesion in those areas. TrJ1895 (Alford). His conclusion is based only on the statistical evidence. *Id.*

535. In Fort Bend County, 31.7% of Hispanics have less than a high school education, compared to 11.3% for the entire County population. Joint Expert Ex. E-1 (Chapa Report) Table 4. The percapita income for Hispanics was $18,086, compared to $43,208 for non-Hispanic Anglos. *Id.* Table 5.

536. The Fort Bend County map was drawn by the incumbents, two Anglo Republicans and an African-American Democrat, working with Interiano.

537. Fort Bend County had enough growth for a new district to be added there. The mapdrawers did not put a new minority district in Fort Bend County, despite substantial minority population growth there.

538. Plans were proposed during the session to create tri-ethnic coalition districts, but mapdrawers did not feel a coalition district was required. They chose to draw the map so that three districts would remain Republican throughout the decade.

539. Dr. Brischetto found that Latinos, African Americans, and Asians were very cohesive in general elections in Fort Bend County. Dr. Brischetto did not conduct a multivariate analysis of the primary elections. Dr. Alford found no expert evidence of cohesion among Latinos, African Americans, and Asians in the primary elections. Plaintiffs provided lay testimony of cohesion.

Dallas County

540. In the benchmark plan H100, Dallas County had 16 districts (100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, and 115).

541. Four districts were African-American opportunity districts and were represented by African-American Democrats: HD100 (Rep. Johnson) (40.3% BVAP, 50.9% BCVAP), HD109 (Rep. Giddings) (63.9% BVAP, 62.2% BCVAP), HD110 (Rep. Mallory Caraway) (42.2% BVAP, 53% BCVAP), and HD111 (Rep. Y. Davis) (49.1% BVAP, 54% BCVAP). TrJ145

(Arrington). These districts were in the southern part of the County.

542. Two districts were considered to be Hispanic districts (only one was majority HCVAP) and were represented by Hispanic Democrats: HD103 (Rep. Anchia) (69.3% HVAP, 46.5% HCVAP and 14% BCVAP using 2005-2009 ACS data, and 38% total SSVR/39.3% non-suspense SSVR) and HD104 (Rep. Alonzo) (77.2% HVAP, 60.8% HCVAP using 2005-2009 ACS data, and 56.7% total SSVR/58.3% non-suspense SSVR). TrJ145 (Arrington); Anchia depo. at 46. These districts were in the central west part of the County.

543. The ten other districts were Anglo CVAP majority districts using 2005-2009 ACS data.

544. HD105 and HD106, in the western part of the County, were majority-minority VAP. Using 2008-2012 ACS data, benchmark HD105 was 50.8% Anglo CVAP with a margin of error of +/- 1.2% and HD106 was only 47% Anglo CVAP. D-100.

545. HD105 was a compact district that included much of the City of Irving. The incumbent was Linda Harper-Brown, an Anglo Republican. HD105 had an HVAP of 31.2%, BVAP of 14.7%, and Anglo VAP of 36.1%. It had 19.6% HCVAP, 15.3% BCVAP, and 56% Anglo CVAP using 2005-2009 ACS data (50.8% +/- 1.2% Anglo CVAP using 2008-2012 ACS data). Hispanic voters did not have the opportunity to elect their candidates of choice in benchmark HD105. US-351 (Handley 2011 report) at 3-8. However, in 2008, Democrat Bob Romano lost to incumbent Harper-Brown by only 19 votes. And in 2008, 7 of 9 Hispanic-preferred candidates prevailed in statewide elections in HD105 (President, U.S. Senate, Railroad

Commissioner, Supreme Court Chief, Supreme Court Places 7 and 8, and Court of Criminal Appeals Places 3, 4, and 9). US-370 at 99-100.

546. HD106 in the benchmark plan was also in the western part of the County, just below HD105, and included portions of Irving, Grand Prairie, and a small part of Dallas. The incumbent was Anglo Republican Rodney Anderson. HD106 had an HVAP of 44.3%, BVAP of 13.7%, and Anglo VAP of 35.9%. It had HCVAP of 29%, BCVAP of 12.8%, and Anglo CVAP of 52% using 2005-2009 ACS data, though, as noted, using 2008-2012 ACS data it was only 47% Anglo CVAP. The total SSVR was 23.4%. Minority voters elected their candidate of choice in HD106 in 2006 and 2008, but not in 2002, 2004, or 2010. US-351 (Handley report) at n.10. In 2010, Anderson narrowly defeated the Democratic incumbent Kirk England by 204 votes.

547. Three districts in the eastern/northeastern part of Dallas County, HD101, HD102, and HD113, had also become majority-minority VAP but remained majority Anglo CVAP. HD113 (60.1% Anglo CVAP) was located in the northeastern corner of Dallas County and had been represented by Anglo Republican Joe Driver since his election in 1992. Some Plaintiffs' experts opined that HD101 (61.3% Anglo CVAP) and HD102 (61% Anglo CVAP) had experienced minority population growth and had become effective minority coalition districts. TrJ1425 (Korbel); Joint Expert Ex. E-5 (Martin Report) at 9-10. Those districts elected Republicans in 2002, 2004, 2006, and 2010, but elected Democrats in 2008. In 2010, Anglo Republican Cindy Burkett was elected to represent HD101, and African-American Republican Stefani Carter was elected to HD102.

548. Dallas County lost population relative to the state as a whole, so Dallas County was only apportioned 14 seats in the 2011 redistricting cycle, meaning a loss of two seats. TrJ145 (Arrington). The mapdrawers knew that the two lost seats would have to be Republican seats because all of the Democrat districts were protected minority opportunity districts. D-192; D-132; TrJ925, TrJ2073, TrJ2015 (Downton). HD106 was one of the two districts that was eliminated from Dallas County (Anderson and Harper-Brown were paired in HD105); it was moved to Denton County, which gained a district. HD101 was eliminated (Burkett and Driver were paired in HD113) and moved to Tarrant County, which also gained a district.

549. The 2010 population of Dallas County was 2,368,139, meaning it was apportioned 14.1266 districts. All districts within Dallas County could therefore be slightly overpopulated from the ideal district size. The Anglo population of Dallas County decreased by over 198,000, a negative 20.2% growth rate. Tr327-28 (Martin); TrJ1423 (Korbel). The minority population of Dallas County grew by almost 350,000 and accounted for 100% of the growth in Dallas County. Tr328 (Martin); TrJ1423 (Korbel). In 2010, Dallas County was 33.1% Anglo, 38.3% Latino, and 22.3% African American. Tr327 (Martin). Despite this growth pattern, the Legislature did not put any new minority opportunity districts in Dallas County. TrJ1423 (Korbel); TrJ146 (Arrington); Joint Expert Ex. E-5 (Martin report) at 8. In addition, their enacted map gave Anglo control (majority-Anglo CVAP) to 8 of 14 districts (57% of districts) in Dallas County. Tr1053 (Murray).

550. On February 17, Hanna emailed Denise Davis with the subject "redist issues." D-192; US-102; Quesada-242. He wrote, "1. Dallas Lose two seats. Both will have to be R's b/c all D seats are minority. It may get worse. If it is possible to draw third Hispanic seat, you'll need to do that too. That would be a 3rd seat. Four Black seats (as now) looks doable." Downton testified that it was not possible to draw a third Hispanic seat. TrJ2053. He said that they could not get two majority-SSVR districts, let alone three, and he did not think it could be done while keeping Alonzo's Latino opportunity district (HD104) at 50% SSVR. TrJ2054-56.

551. On February 18, 2011, Denise Davis forwarded Hanna's email to Interiano. D-132. Interiano responded to Davis stating, "[Hanna] and I went through all of this yesterday afternoon and through some of the first things that we need to look at as soon as RedAppl is up and running. . . . As far as Dallas goes, the ones that are going to be at risk are Sheets, R. Anderson, and Burkett,[15] but Hartnett may also have issues because Branch has to pick up population as well and he told me last night that he would like to pick it up from Hartnett and give up some other portions to some of the minority seats." D-132.

552. Dallas was a drop-in county, but the delegation could not agree on a map due to the loss of two seats and no members wanting to be paired. Tr924, TrJ2014-15 (Downton); Y. Davis depo. at 199. Rep. Branch (Anglo, Republican), a member of the

---

[15] There is no evidence as to why these three representatives were "at risk," but they had all been recently elected in the 2010 elections, defeating Democrat incumbents.

HRC, served as the delegation lead and tried unsuccessfully to get an agreed delegation map. Downton was then tasked by Branch with trying to draw a map. Tr924, TrJ2015-16 (Downton).

553. Downton was the principal mapdrawer for Dallas County. Downton 8-31-11 depo. (Joint Ex. J-62) at 72-73; Tr924-29, 930-39 (Downton). Downton drew some of the districts with Rep. Branch, particularly his district (HD108). TrJ2015-17, 2073-74 (Downton). As to the other districts, Downtown came up with ideas and met with some members to get their input. TrJ2016 (Downton). Downton met with Democrat members Anchia (HD103) and Johnson (HD100). Tr2017 (Downton). Several of the members came to talk with him, including Burkett and Harper-Brown, who also gave him a Dallas County proposal. TrJ2016-17. Downton got district proposals from all members except Alonzo. Tr924 (Downton). Downton testified that he got a proposal from Y. Davis but said she did not have approval of the other Democrat members for those districts (there is a plan in the hrc1 account that says it was "received from davy," though Rep. Y. Davis said that she did not submit a map). Tr924, TrJ2077 (Downton); PL-1615 (plan log). Downton stated that he "essentially looked at various ideas from different people" and "drew a map." Downton 8-31-11 depo. (Joint Ex. J-62) at 100.

554. Dallas County was not a "member-driven" process. Y. Davis depo. at 32, 198. Although some members participated, Rep. Davis said she was "shut out of the process." Davis depo. at 198. Davis was not shown her district before the first plan was publicly released. *Id.* at 202. Davis testified that Solomons and his staff did not work with her or her office. *Id.* at 35-

36, 41, 44, 207. She testified that when she talked to Solomons, he said to have her staff contact his staff, but when her staff reached out to the designated redistricting person, he did not respond. *Id.* at 41-42. He was nonresponsive to their inquiries about how to submit plan ideas or to see the map in progress. *Id.* at 208-09. Davis did not feel that Solomons' door was open to her and felt that the Republicans already had a plan and "we were not part of that factor." *Id.* at 43, 45. She testified that "we were not successful in getting involved with his office with the maps." *Id.* at 199. Davis testified that she was told that Solomons was drafting his own map. *Id.* at 208. She also testified that one of the other members had told her that Solomons had directed her to talk to Rep. Branch about the map, but she did not provide a map to him because he was not on the HRC, and Branch later told her that he was not putting together the Dallas County map. *Id.* at 209-11.

555. Mapdrawers knew early in the process that they would likely pair Reps. Harper-Brown and Anderson, and Downton was drawing some maps pairing them as early as March 10 in hrc1H135. TrJ2073 (Downton). For the other pairing, there were different ways it could have been done. *Id.*

556. The first map sent to Hanna for a retrogression analysis (either hrc1H215 or hrc1H220) contained a Dallas County map that was very different from what ended up in Plan H283. It does not appear to pair Harper-Brown and Anderson. Hanna's first retrogression memo, written around April 7 (D-122), raised some concerns about Dallas County. Hanna noted that the proposed HD103 went from 38.0% total SSVR to 33.8% total SSVR and HD104 went from

56.7% SSVR to 45.6% SSVR, and wrote that both districts "present retrogression issues." He continued, "While both are significantly short people (more than 86,000 combined), no new Hispanic districts are being added in Dallas County, and the overall percentage increase in the Hispanic population in Dallas County makes the declines in SSVR especially difficult to justify. While it can be argued that District 104 will likely perform at 45.6 SSVR since this is similar to the performing level it was drawn at in 2001, no similar argument exists for the reduction in District 103. Accordingly, at a minimum, the decline in SSVR in District 103 should be remedied. Consideration should also be given to keeping District 104 over the 50% SSVR threshold if this can be done." D-122; TrJ2143-44 (Downton). With regard to the African-American opportunity districts, Hanna wrote, "The Black population in Dallas County is moving to the south and West and out of the inner city. This is reflected in the disparities in the Black populations in the current districts between the two more northerly ones (100 and 110) and the two southern ones (109 and 111). This effect is enhanced by the proposed plan and presents clear retrogression issues. With the Black percentage in District 109 sitting at 62.1% in the proposed plan, it is likely that the levels of Black populations in District 100 and 110 can be restored significantly closer to their current levels without endangering the viability of District 109 or District 111 as performing Black districts. Additional leveling out of the Black populations could occur, but likely would not be required for preclearance under Section 5."

557. Downton stated that, in response to Hanna's suggestion to remedy the SSVR decline in HD103 and keep HD104 above 50% SSVR, they increased SSVR in both of those districts. TrJ2143-44. To do this, Downton used HVAP racial shading at the block level (SSVR is only available at the precinct level and he could not recall whether he could shade for SSVR). TrJ2144 (Downton). Downton was able to increase the SSVR in HD104 to 48.1% total SSVR and 50.1% non-suspense SSVR. TrJ201 (Arrington).

558. Downton admitted using block level racial shading when drawing all six minority districts in Dallas County—HD100, 103, 104, 109, 110, 111. Downton 8-31-11 depo. (Joint Ex. J-62) at 113-14.

559. Downton testified that he began with Anchia's district HD103 and with HD104, because those were the two Hispanic opportunity districts. TrJ2017, TrJ2069. He testified that he drew HD103 and then drew other districts around it. Tr999. Downton also testified that he worked with Rep. Anchia to determine what population to include. Tr999, TrJ2017. It is not clear from the testimony whether Downton was referring to the time before or after Hanna's first retrogression memo, but it appears to be after. Anchia confirmed that he was involved in the configuration of his district. Anchia depo. at 15. They generally discussed the "metes and bounds" of the district, and Anchia made specific requests about areas he wanted included in his district, but did not recall those requests other than including a portion of Farmers Branch and Carrollton. *Id.* at 15:25-16:10. He does not recall making any requests about the overall demographics or kind of voting profile of his district. *Id.* at 16:11-14. HD103 was at the bottom end of the

population range and needed more population. Downton testified that they tried unsuccessfully to get the SSVR of HD103 above 50% but could not have it and HD104 both above 50%, so mapdrawers decided to maintain the SSVR of HD103 at benchmark levels. Tr925-26, TrJ2069. Downton testified that because mapdrawers also wanted to maintain the SSVR in HD104 over 50%, they could not take concentrated Hispanic population out of 104 to put into 103 because it would have dropped the SSVR in HD104. He stated that although the Hispanic VAP in the area was high, there were a lot of noncitizens. Tr926 (Downton). Benchmark SSVR in HD103 was 38% total/39.3% non-suspense, and in Plan H283 it was reduced slightly to 36.9% total/38.1% non-suspense. Although SSVR decreased, Anchia did not think it affected the ability of Hispanic voters to elect their candidate of choice, and Downton agreed with him. TrJ2071 (Downton). Anchia was displeased that his district was so overpopulated (5%), and it seemed like there was an effort to put a lot of population in unnecessarily, but otherwise he was happy with his district. Anchia depo. at 19, 165. However, he voted against Plan H283. Tr160 (Martinez Fischer).

560. In Plan H283, an HD103 arm reaches to the west into HD105 (represented by Anglo Republican Harper-Brown), picking up the most heavily concentrated Latino population in Irving and splitting ten precincts. Tr323-24 (Martin); TrJ148 (Arrington). These splits made HD103 at lot less Anglo and more Hispanic, and made HD105 more Anglo. TrJ151 (Arrington). Downton admitted using racial shading in drawing HD103, including the incursions of HD103 into HD105, because he wanted to keep the SSVR of

HD103 at benchmark. TrJ2080-81 (Downton). This is confirmed by racial shading exhibit PL-106, which shows that the HD103 west arm is picking up primarily population that is 70-100% Black + Hispanic population.

561. HD105 has a long arm that reaches from Irving in west Dallas County down through Grand Prairie, with HD104 wrapping around it. Downton had been instructed to pair Rep. Anderson with Rep. Harper-Brown in a district either could win (*i.e*, a Republican district). Anderson lived in southern Grand Prairie, so Downton had to draw the long extension down from HD105 to pick up Anderson's home and pair him with Harper-Brown, who lived at the north end of the district. Downton 8-31-11 depo. (Joint Ex. J-62) at 113; TrJ2018 (Downton). Downton stated that he also drew the arm to contain Republican-leaning precincts, which fit more with the composition of HD105, which is a Republican-leaning district, than HD104, which is a Democratic-leaning district. He testified that he did that by looking at political shading, and the area below the highway was the most Republican area, and so he pulled it up into HD105. Tr927. Additionally, he testified that the 105/104 configuration was a combination of trying to pick up Anderson's house for HD105, trying to keep HD104 compliant with the VRA, and trying to cut Grand Prairie into as few pieces as he could, given other considerations. Tr928. Downton stated that the fact that the HD105 southern arm into HD104 matched with picking up Anglos was explained by trying to maintain the Hispanic numbers of 104 by putting Anglos in HD105 and not in HD104. Downton 8-31-11 depo. (Joint Ex. J-62) at 114-15. Downton

admits using racial shading at the block level when drawing HD105 and HD104, but says it was to keep HD104 above 50% SSVR and loop it around the southern portion of HD105 that picked up Anderson's home. Tr928-29, TrJ2080. Interiano testified that they drew the HD105 arm down to pick up Anderson, and then drew HD104 around it. Interiano 8-9-11 depo. (Joint Ex. J-61) at 36 . He also testified, "As much as possible, we tried to keep the minority community in Dallas County t gether." *Id.* at 37

562. Downton split a number of precincts between HD104 and HD105. Downton stated that he split precincts because there was no policy against it and he needed to create the pathway to Anderson's house while maintaining HD104's total and Hispanic population. TrJ2020-21. He stated that he split Precinct 4504 because it was too large to include all of it in HD105 and he needed to maintain a pathway to keep the population of Precincts 4510, 4514, and 4516 in HD104. TrJ2021. He said he split Precinct 4508 to create a pathway to Anderson's home without taking too much population; he split Precinct 4515 to comply with the VRA for HD104, and he did not recall why he split Precinct 4517. TrJ2022-24. Downton testified that he did not know of any other ways to pair Anderson and Harper-Brown, keep HD104 above 50% SSVR, and maintain HD103 at or as close as possible to its benchmark SSVR level. TrJ2081.

563. The boundary of HD105 divides the cities of Grand Prairie and Irving, splits 22 precincts, and breaks up numerous communities of interest. Tr321-23 (Martin); US-387 at (Red-381 Report); US-299. The benchmark configuration of HD105 is compact, encompassing most of Irving north of the Rock Island

railroad and west of Loop 12. TrJ1107 (McPhail). HD105 in H283 has jagged, bizarrely shaped lines, that extend much farther outward than they used to. TrJ1108 (McPhail). Downton split precincts in the HD105 arm extending into HD104 on the basis of race to include Anglos in HD105 and place Hispanics in HD104. TrJ148 (Arrington); Tr322 (Martin). HD103 reaches an arm into HD105 to take Hispanic portions of Irving by splitting precincts. TrJ146-48 (Arrington); TrJ599 (Lopez); TrJ1117-18, TrJ1121 (McPhail); Tr321 (Martin); US-299D. The population excluded from HD105 by splitting precincts was disproportionately Hispanic and low income. TrJ599-01, 602-05, 606-09 (Lopez); TrJ1124-25 (McPhail); US-299D. The population included in HD105 in split precincts is disproportionately Anglo and relatively affluent. TrJ151 (Arrington); TrJ595-96, TrJ601-02, TrJ606 (Lopez); TrJ1109-26 (McPhail); US-356 ¶¶ 52-53 & Table 1 (Feb. 2014 Arrington report). Downton deliberately split precincts by race to put Hispanic voters into HD103 and HD104 but not in HD105. TrJ2069 (Downton); TrJ147-51 (Arrington).

564. Hanna's first memo (around April 7) had pointed out that HD109 had 62.1% BVAP and districts 110 and 100 had gone down but could be restored. In Plan H113, the BVAP of HD109 is 57.4%. BVAP in HD100 is 40.8% and in HD110 is 42.5%. Downton spoke with Rep. Caraway and she gave him some suggestions about her district HD110. Tr1018 (Downton). He did not recall Caraway complaining to him that the Hispanic numbers in her district were dramatically increased. *Id.* Again, it is not clear whether Downton worked with these members

initially or in making changes after Hanna's initial retrogression memo.

565. Hanna's second retrogression memo, written around April 12, still noted the decreases in SSVR for HD103 and HD104 as potential retrogression issues and suggested remedying the reduced SSVR (36.8% total, down from 38%) in HD103. With regard to the African-American districts, Hanna no longer felt that there were retrogression issues. D-327.

566. Plan H113, the first public plan, was released April 13. As noted, Rep. Linda Harper-Brown (Anglo, Republican) and Rep. Rodney Anderson (Anglo, Republican) were paired in HD105, and Rep. Cindy Burkett (Anglo, Republican) with Rep. Joe Driver (Anglo, Republican) in HD113, and HD101 and HD106 were eliminated. The Plan H113 configuration of Dallas County remained mostly unchanged in Plan H283. The only change was through Branch's amendment at the April 19 committee meeting, which shifted 690 people from HD108 into HD103.

567. At the April 15 hearing before the HRC, Sandra Crenshaw from Dallas testified against Plan H113, asserting that it improperly split cities. D-595 at 206. She also noted that splitting precincts causes costly problems for elections and confuses voters. *Id.* at 208.

568. At the April 17 hearing before the HRC, Rep. Driver (Anglo, Republican), who had been paired with Burkett in Dallas County, asked how the map was created and what criteria had been used. He wanted to know how they had decided to pair a senior and junior member, and why the map was changed from what he had been shown before.

569. Rep. Mallory Caraway (African-American, Democrat, HD110) opposed Plan H113. She complained that she was not included in the delegation meeting and she did not know that Rep. Branch was in charge of drawing districts. She said the plan destroyed the community of interest in the southwestern portion of HD110. She said that certain precincts (3506, 3514, 3515, 3517, 3526, 3351, and 3353) should not be moved into HD100 (because they do not share interests with the rest of HD100) but should stay in HD110 (her district) and that the plan was gerrymandered to include them in HD100. She proposed a map to move them back into HD110 and to put other precincts that were more "geographically compatible" into HD100. She complained that the precinct she lives in (Precinct 3515) was split. She stated that she proposed a district, but the map did not look like her proposal. She noted that HD109 (Giddings) was the only district that gained population, so it was more logical for HD110 to absorb that excess, and she proposed that in her map to Solomons. Although HD109 did absorb some of that population, she also lost some of her most valuable precincts. She said she understood that changes were necessary given the loss of a district but did not see why drastic measures were taken to disconnect her core stable precincts. She also stated that Plan H113 eliminated a majority African-American district by diluting the African-American voting strength in HD100 and giving it to HD110. Rep. Johnson (HD100) testified in opposition to Caraway's proposed changes that would swap areas between HD100 and HD110. He stated the changes would reduce the BVAP of HD100 from 40.8% (H113) to 36.5% (benchmark was

40.3%). Johnson stated it would impermissibly retrogress HD100. No changes were made.

570. Sandra Crenshaw (Precinct 3549 Chair) from Dallas testified against Plan H113. She stated that Oak Cliff was split among districts and the African-American community in HD110 should be kept together. She objected to suburban districts coming in and "cherry picking" population and asserted that Oak Cliff should stay together. She also stated that HD100 could get African-American population from Mesquite. She noted that Dallas County representatives had testified about lack of transparency and encouraged the mapdrawers to respect communities of interest.

571. At the April 19 HRC formal meeting, Rep. Branch offered an amendment (Plan H126) to the committee substitute (Plan H134) affecting HD100, 103, and 108 in Dallas County, and an amendment (Plan H148) to the amendment (Plan H126). D-12. The amendment (Plan H126) and the amendment to it (Plan H148) were adopted. This moved some population between HD108 and HD103.

572. The third Hanna memo, which considered Plan H153 voted out of committee, raised the same concerns about HD103 and HD104 and suggested remedying the drop in SSVR in HD103 but did not raise any other concerns about Dallas County. US-338.

573. On April 22 and 23, Interiano was working on the Dallas County map as a possible amendment, and emailed Hanna to run a retrogression analysis on it. US-171; US-161; PL-1669; D-133. Archer responded to Interiano's email and noted that benchmark HD103 was not a Hispanic opportunity district and he had not seen a plan that made it into one. D-134.

574. On April 27, during second reading, Rep. Veasey pointed out that Anglo population had decreased by 198,000 in Dallas County and all the growth was minority, that although Anglos were only about 33% of Dallas County they still controlled most of districts, and that the numbers did not seem to be adding up. D-13 at S116. Solomons replied that the committee did not see the need to create new districts, and that primarily the growth "was in a lot of existing protected districts." *Id.* He said it "didn't grow in the relevant areas." *Id.*

575. Rep. Anderson (Anglo Republican) laid out Amendments No. 3 (H220) and 4 (H247) relating to Dallas County that would pair Rep. Sheets and Hartnett and Driver and Button instead of Anderson and Harper-Brown. D-190 at 92-95, S733; D-13 at S134-35. Anderson stated that he believed the district as currently drawn was fair and legal but he "believe[]d there's another way to keep the core districts and communities of interest together. It keeps Mesquite, Garland, Richardson, Carrollton, Addison, Irving, and Grand Prairie predominantly intact. It also reflects the diverse neighborhoods that are located within the city of Dallas." D-13 at S134. Rep. Martinez Fischer stated that the proposed map might be retrogressive because it dropped HD104's SSVR from 58.3% to 45.5% and it did not create any new opportunity districts. *Id.* at S138, S141. Republicans Hartnett, Jackson, Branch, and Harper-Brown did not support the amendment. Solomons moved to table, and it was tabled. *Id.* at S142-43.

576. Rep. Driver (Anglo, Republican) took issue with Solomons' statement that it was a memberdriven map in Dallas County and complained that he was not

consulted on his district or on Dallas County, that it was not inclusive, and that his community of interest was "cut up." D-13 at S137, S141, S157. Rep. Anderson complained that the proposed map "dramatically chang[ed] representation throughout all of Dallas County." *Id.* at S142.

577. Rep. Harper-Brown proposed Amendments 5 and 6 (Plan H219) relating to Dallas County. Harper-Brown asserted that the amendment would keep more of Irving in HD105 and allow HD115 to encompass Carrollton and Farmers Branch and protect the community of interest of these cities and improve compactness. Rep. Giddings (African American, Democrat) complained that it destroyed the core of HD109, a minority opportunity district. D-13 at S144. Anderson complained that it divided Grand Prairie, "the 15th largest city in Texas," into five pieces in Dallas County. *Id.* at S145. Rep. Y. Davis asserted that it changed HD111 from a majority African-American district to majority Hispanic and opposed the amendment. *Id.* at S146. Anchia complained that it reduced the SSVR of his district, and he opposed the amendment. *Id.* at S148. Solomons stated, "It breaks up Grand Prairie far more than what the original map does. It redraws the west side of Dallas County. It reduces Representative Anchia's SSVR numbers problematically simply but not enough for Leg Council to have an over-concern. . . ." *Id.* Rep. Turner opposed the amendment on behalf of the Legislative Black Caucus "because we view it as outright regression" (to change it from an African-American district to a Latino district). *Id.* at S155. It was tabled. D-13 at S158; D-190 at 96-97.

578. Rep. Martinez Fischer then set forth Amendment No. 32 (H199) focusing on Dallas and Tarrant Counties to increase the number of opportunity districts. This plan included three districts that spanned Dallas and Tarrant Counties. Martinez Fischer stated that Plan H153 violated § 2 of the VRA by limiting the creation of minority opportunity districts. Rep. Alonzo noted it was the same plan Martinez Fischer had presented for other areas, but he was just focusing on DFW. D-13 at S223. A statement of legal issues regarding the DFW metroplex and the April 27, 2011 letter from MALDEF stating that Plan H153 was retrogressive were made a part of the record. *Id.* at S224. The statement of legal issues noted that H153 substantially overpopulated Latino majority districts HD103 and HD104 in Dallas and across the state. It concluded that the overpopulation of Latino majority districts in Dallas County served to limit Latino influence in Dallas County House districts. *Id.* at S221-22. It argued that use of the County Line Rule fenced apart minority voters in Dallas County and Tarrant County, and that Plan H153 packed minority districts and failed to create additional minority opportunity districts, while alternative plans created up to two by unpacking districts and avoiding the County Line Rule. *Id.* at S222. The amendment was tabled. D-13 at S230.

579. Martinez Fischer also proposed Amendment No. 34, Plan H201. Joint Map Ex. J-24. Like the enacted plan, this plan eliminates HD101 and HD106. Using 2005-2009 ACS, HD109, 110, and 111 remain

majority BCVAP, but HD100 is 46.6% BCVAP.[16] HD103 is 42.2% HCVAP (34.4%/35.3% SSVR) and HD104 is 56.9% HCVAP (51.7%/53.4% SSVR). HD102 is 49.7% Anglo CVAP (though B+HCVAP is less than 50%). The Anglo VAP of HD102 is only 31.2% and the Anglo VAP of HD105 is 40.1%. Seven of the districts are majority Anglo CVAP.

580. Arrington opined that Plan H201 creates eight minority districts — four African-American, three Hispanic, and one in which the situation in the primary is "unclear." US-352 at 18. The plan pairs Republican incumbents in three districts and leaves HD106 an open seat. *Id.*

581. Rep. Turner laid out Amendment No. 35, Plan H202, on behalf of the Legislative Black Caucus. This plan eliminates HD114 and HD115. Plan H202 maintains the four African-American districts, though the BCVAP of HD100 falls below 50% to 47.2% Black Alone CVAP (47.6% combined). It maintains HD104 above 50% HCVAP and includes an HD103 with a lower HCVAP than benchmark (38.8% compared to 46.5% HCVAP in the benchmark) and lower SSVR. It also creates an additional proposed minority coalition district (HD107) in northeastern Dallas County. Using 2005-2009 ACS data, HD107 had a BCVAP of 26.5% and HCVAP of 23.9%, for a combined B+HCVAP of 50.4%. Joint Map Ex. J-25; TrJ581 (Wallace); TrJ913, TrJ921 (Fairfax); Y. Davis depo. at 67. The Anglo CVAP was 42.8%. Y. Davis depo. at 67. Rep. Davis testified that HD107 was drawn to recognize the

---

[16] Chapa estimated that HD100 was 49% BCVAP. Joint Expert Ex. E-2 Table 9. Using 2008-2012 ACS data, HD100 is 47.3% (+/- 1.6) BCVAP.

Hispanic and African-American communities that had grown in the area. Y. Davis depo. at 67. Lay witness Juanita Wallace is familiar with the area of proposed HD107 and states that Hispanics and African Americans live in the proposed HD107, and they would benefit from additional representation of their choice. TrJ578 (Wallace).

582. Rep. Coleman set forth Amendment No. 38, a statewide amendment (Plan H232), that would create a number of opportunity and coalition districts (59 in total). He said that minority population was responsible for 100% of Dallas County growth because Anglo population declined by over 198,000. This plan eliminates HD106 and HD107. Coleman's written comments for Plan H232 were put into the record, and they assert that this plan: creates a new Latino district HD105 (60% HVAP, though only 34.1% HCVAP using 2005-2009 ACS data) while preserving the two existing Latino districts HD103 and HD104; creates a new HD102 that is 80% non-Anglo in terms of total population and 67.5% B+HVAP (50.8% B+HCVAP); and preserves coalition HD101 (this is 49.3% B+HVAP but remains 60.9% Anglo CVAP). He asserted it would provide minority opportunity in 64% of the districts (9 of 14) in a county that is 67% non-Anglo, compared to 42% in H153. D-13 at S248. The amendment was tabled. D-13 at S250. H232 keeps HD100, 109, and 110 above 50% BCVAP using 2005-2009 ACS, but HD111 drops to 48.9% (+/- 1.5). The SSVR of HD103 is reduced to 38.3/40.4% (45.2% HCVAP using 2005-2009 ACS) and the SSVR of HD104 is reduced to 43.5/45.2% (49.2% (+/-1.9) HCVAP using 2005-2009 ACS). HD101 is 60.9% Anglo CVAP and HD105 is 52.5% Anglo CVAP using 2005-2009 ACS data. HD102 is a coalition

district with 24.3% HCVAP and 26.5% BCVAP. *See also* Joint Map Ex. J-28; Joint Expert Ex. E-3 (Lichtman Report) at 9-14; Tr1230 (Lichtman).

583. Rep. Giddings (African-American, Democrat) noted that he and other Dallas County members had submitted maps and they were not accepted. He stated that the proposed committee map was problematic because it did not create influence districts and there was racial disparity in terms of African Americans having less representation than could have been achieved, and the communities of interest were not preserved in minority districts. D-13 at S253.

584. Even Anglo Republican members of the House felt that the Dallas County map unnecessarily divided physical communities and did not maintain core districts and communities of interest.

585. In Plan H283, based on deviation from the statewide ideal district size, HD103 is overpopulated by 8,379 persons (5%) (the most in the County) and HD104 is overpopulated by 5,147 persons (3.07%). Of the four African-American districts, one is overpopulated (HD109 by 3.9%) and three are underpopulated (HD100 by 3.87%, HD110 by .05%, and HD111 by .39%). Of the eight Anglo districts, four are underpopulated and four are overpopulated. HD102 is underpopulated by 3.88%; HD108 is underpopulated by 2.63%; HD112 is underpopulated by .35%; and HD115 is underpopulated by .54%. HD105 is overpopulated by 4.83%; HD107 is overpopulated by 2.53%; HD113 is overpopulated by 2.25%; and HD114 is overpopulated by 2.8%.

586. Dr. Arrington and Martin testified that HD103, HD104, and HD105 are also overpopulated

using the County ideal, and population deviations play a role in not creating a new minority district. TrJ222 (Arrington); Tr330-32 (Martin). Martin and Arrington opined that the two Latino districts HD103 and HD104 are overpopulated and packed with excess Latino population, preventing that population from being used to create another minority district, and that HD105 is overpopulated with Anglos, preventing it from providing minority opportunity. Tr326, Tr330 (Martin); TrJ149, TrJ148-51, TrJ222 (Arrington).

587. The HD103 western arm and the HD105 southern arm are not in the benchmark configuration of Dallas County. PL-103; Tr328 (Martin). As noted, the HD103 western arm reaches into Irving in HD105 and takes out the Latino population, splitting approximately ten precincts. Tr322-23 (Martin). The HD105 southern arm then reaches down to the "most Anglo part of the City of Grand Prairie" to pick up that population, following the "least Hispanic channel that could have been drawn" and splitting seven precincts to split out the Latino community of Grand Prairie into HD104. Tr321-22 (Martin). The net effect of the new configuration of taking Latino Irving population out of HD105 and picking up Anglos with the southern arm is to increase Anglo VAP by about 5% over benchmark in HD105. Tr325(Martin). HD105 is also overpopulated by 8,091 persons. *Id.* Because the additional population is Anglo population from the south, it makes it more difficult to draw an additional minority opportunity district in West Dallas County. *Id.* Without those additional Anglos in the southern arm, the district is more likely to elect Latino candidates of choice. Tr326 (Martin).

588. Arrington testified that other plans created more minority opportunity, such as Plan H201 and Plan H288. TrJ150; US-352 ¶¶ 52-59 & Tables 5-6 (Oct. 2011 Arrington report). These were not incumbent-protection plans. Arrington asserts that the failure to recognize the Hispanic population growth by increasing representation, when it could have been done consistent with traditional districting principles, is evidence of intentional discrimination. US-352 at 17-18. He further asserts that Plan H288 and Plan H201 are examples of "what can be done if the line drawer makes an effort to recognize the demographic changes that are rapidly altering the racial landscape of Dallas County." *Id.* at 18. He opined that those who drew Plan H283 "did not make any effort to increase representation for minority citizens to match these drastic changes." *Id.*

589. The total deviation of Dallas County is 8.88%. Tr329 (Martin). Downton testified that he did not recall an effort to limit the deviation range to 1%. Downton 8-31-11 depo. (Joint Ex. J-62) at 96. Downton said that he could not draw the districts at zero deviation. His explanation (Downton 8-31-11 depo. (Joint Ex. J-62) at 97-98) was:

> In Dallas County there was — there were multiple districts that are minority opportunity districts. You've got one district there that it's arguable as to whether it is or not, depending on your definition. Representative Anchia's district [HD103]. Based on the definition I've been using, the 50 percent threshold, Representative Anchia's district did not have 50 percent SSVR. And you could not get it 50 percent SSVR. But what we

did to try to stave off any possible legal challenge with Dallas County, we wanted to maintain as close as possible to the benchmark levels for minority populations as possible in Hispanic districts and the district. Representative Anchia's district was the most underpopulated district in the entire state.[17] I think Representative Alonzo's neighboring district [HD104] was slightly underpopulated or right around the line.[18] So I don't think we could have brought Representative Anchia's district up to the ideal population and Representative Alonzo to the ideal population and also maintain their benchmark levels of minority population.

590. In his October 20, 2011 deposition, Downton testified that HD103 is 8,379 above ideal population (about 5%) and that he drew it with that deviation because he worked with Rep. Anchia to include that population. TrJ2148. Anchia, however, was not happy that his district was overpopulated. Downton further testified that it was not necessary to have a 5% deviation in HD103 to maintain the Hispanic population, and that there were others ways to have done it, "but that was a policy decision." TrJ2149.

591. In Plan H283, HD103 is 67.7% HVAP, 44.6% HCVAP using 2005-2009 ACS, and 36.6% total

---

[17] At the start of redistricting, HD103 was 30% underpopulated and was in fact the most underpopulated district in the state.

[18] HD104 was in fact 21.32% underpopulated. Of course, due to Dallas County's comparative slow population growth, all but HD109 were underpopulated. But the two Latino districts HD103 and HD104 were among the most underpopulated.

SSVR/37.6% non-suspense SSVR. HD103 has one of the lowest perimeter-to-area compactness scores (.081) in Plan H283.

592. HD104 is 69.2% HVAP, 51.7% HCVAP using 2005-2009 ACS data, and 48.1% total SSVR/50.1% non-suspense SSVR. HD104 has the lowest perimeter-to-area compactness score (.076) in Plan H283. Giberson depo. (Joint Ex. J-42) at 46.

593. HD105 is 39.2% HVAP, 24.1% HCVAP using 2005-2009 ACS data, and 18.1% total SSVR/18.3% non-suspense SSVR. The Anglo VAP went from 36.1% in H100 to 41% in H283. The HVAP went from 31.2% to 39.2%.

594. In his report, Martin asserted that HD101, HD102, HD106 were effective districts that were less than 50% Anglo VAP, and that HD107 was also less than 50% Anglo VAP and had elected the minority voters' candidate of choice during the prior decade, and that all these districts were eliminated in plan H283. Joint Expert Ex. E-5 at 4. He asserted that even though minority population growth was responsible for over 100% of the Dallas County population growth, Plan H283 creates no new minority opportunity districts and eliminates effective majority-minority coalition districts. *Id.* at 8.

595. Martin opined that Plan H283 uses a bizarre configuration in west Dallas County to dilute a trending minority district HD105 and prevent creation of an additional Latino district, eliminates two effective majority minority coalition districts—101 and 102—by splitting areas of rapid minority growth in eastern and northeastern Dallas County into five Anglo-controlled districts, eliminates majority-

minority HD106 (Grand Prairie) and its population is not used to create an additional minority district in west Dallas County, and contains an unnecessary 8.8% population deviation with Dallas County. Joint Expert Ex. E-5 (Martin report).

596. Martin opined that the gerrymander of HD105 preserved Republican advantage and prevented an additional Latino district. Joint Expert Ex. E-5 at 8. He asserted that benchmark Irving-based HD105 had only 36.1% Anglo VAP and experienced rapid Latino population growth, and benchmark HD106 had only 35.9% Anglo VAP, so between them there was sufficient Latino population to create an additional effective district. But instead of creating that district, he contends, Plan H283 extends HD105 south through a series of narrow channels that split seven predominantly Latino precincts, dividing the Grand Prairie Hispanic population while reaching far to the south for the Anglo population. *Id.* Latino HD104 was packed, and then looped around this bizarre southern extension of HD105 to run back north up the western border of the county. *Id.* To the north, a long narrow arm of Latino HD103 is extended through HD105 in Irving, splitting ten precincts to remove Hispanic population from HD105. As a result of this bizarre configuration, the Anglo VAP of HD105 is increased from 36.1% to 41% and no additional Latino district is created. *Id.*

597. Martin opined that deviation and other factors have prevented the creation of a minority opportunity district in northeast Dallas County. Tr331. Where HD107, 112, 102, 114, and 100 come together, there is a significant area of minority population growth in northeast Dallas, south

Richardson, and that population is split among five districts in H283 instead of together where it might be able to elect a candidate of choice. Tr331-35 (Martin). He also opined that two effective eastern/ northeastern Dallas County majority-minority districts (HD101 (Anglo VAP 46.7%, district eliminated) and HD102 (Anglo VAP 43% increased to 51.2%) were eliminated by splitting minority population into five Anglo districts.

598. Plaintiffs' expert Korbel opined that the minority population of HD101 was split among HD113, which is a long district that stretches almost all the way along the county's edge, and HD107 and HD110. TrJ1425. Some of the black population was moved into an already packed district HD110, and the minority population placed in HD113 is diluted with Anglo population from the north. TrJ1427 (Korbel). HD106 was already a very heavily minority district and it was close to ideal population, but the Legislature moved it to Denton County. TrJ1425 (Korbel). HD104 and HD105 are moved into where HD106 had been. TrJ1427 (Korbel). HD104 is the most noncompact district in Plan H283. TrJ1427 (Korbel). These are strange-shaped districts that do not appear to follow traditional redistricting principles. TrJ1427-28 (Korbel). HD105 extends down into HD104 and picks up minority population and ties it into heavily Anglo population to the north, cracking the minority population and making it difficult for them to elect their candidate of choice. TrJ1429 (Korbel). There are numerous places within Dallas County where the minority population is cracked. *Id.* The minorities that were in HD101 are split into HD113, HD110, and HD107. *Id.* Minority population in the northeast

corner is split between HD112 and H113. *Id.* Minority population is split between HD100 and HD107. TrJ1430 (Korbel). Minority population in central Dallas County is split between HD100 and HD108, which contains Highland Park. *Id.* In the northwest area, minority population is split between HD103, HD105, and HD115. *Id.* In west Dallas County, HD104 and HD105 split the minority community. TrJ1431 (Korbel). HD100 is also one of the five least compact districts in the map. TrJ1432 (Korbel). Korbel agrees that there is enough spread-out minority population that it cannot all be put in one district and any map will split some minority population. TrJ1458. Korbel did not look at the role of incumbents and how it might have affected the lines. TrJ1460. He did not consider the role of Rep. Johnson (African American, Democrat) in drawing HD100 (Downton testified that he worked with Johnson on the district, however it is not clear whether this was before he made significant changes to the map). *Id.*

599. Murray opined that minorities in Dallas County are worse off than they were in the benchmark plan. Joint Expert Ex. E-4 (Murray Report) at 33. He noted that, over the decade, there was rapid Anglo population share decline in HD101, 102, 105, 106, and 107, such that these non-competitive districts represented by Anglo Republicans gradually came into play. In 2008, Anglo Republicans lost four of the five districts, and prevailed in the fifth by only 20 votes, though the four lost seats were recaptured in 2010. He felt these areas presented minority opportunities, but Plan H283 "takes that opportunity off the table" by eliminating two of the mixed districts (HD101 and HD106), assigning as many minority residents as

possible to the six protected minority districts, and moving the rest of the minority voters into districts with high-turnout Anglos and a recent history of polarized voting. Joint Expert Ex. E-4 (Murray report) at 32-33.

600. In Dallas County, Perry got 42.5% of the vote and Bill White got 55.2%. Tr327 (Martin). Obama got 57.27% of the vote and McCain got 41.97%. Tr327 (Martin).

601. Perez Plaintiffs propose Plan H288 for Dallas County to show that up to nine minority opportunity districts could be drawn in Dallas County (as opposed to six in Plan H283). Perez-107; PL-207; D-110; Tr333 (Martin); Joint Expert Ex. E-5 (Martin Report) at 9. It has a 1.72% deviation, which was not difficult to achieve. Tr334 (Martin). The basic configuration of districts in this map is similar to that in Plan H232, offered by Rep. Coleman during the session. According to Martin, Plan H288 creates HD102 in northeast Dallas County to recognize minority growth in that area. HD102 is two-thirds Black plus Hispanic VAP and majority H+BCVAP, is less than 20% Anglo population, and is very compact. Tr334-35 (Martin); Joint Map Ex. J-33. HD101 is preserved as a majority-minority district with 46.4% Anglo VAP. Joint Expert Ex. E-5 (Martin Report) at 10.[19] In west Dallas County, HD103 and 104 are retained as performing Latino districts, and HD105 is "fixed" so that it is 66.3% Hispanic population, and 60.4% HVAP (35.6% HCVAP

---

[19] Because HD101 remains 61.1% Anglo CVAP, it must be considered a crossover district (or a combination minority coalition + Anglo crossover district) rather than a true minority coalition district.

using 2005-2009 ACS; 37.4% using 2008-2012 ACS data). Tr335 (Martin); D-110. The net effect is an additional Latino district and two additional coalition districts where minority voters can elect their candidate of choice while more closely achieving one-person, one-vote principles. Tr335 (Martin); Joint Expert Ex. E-5 (Martin Report) at 10. Martin admits that HD103 does not have a great shape (though it is no worse than HD104 in H283), but Martin says that is caused by HD100 coming in to keep together the traditional African-American community in West Dallas that has always been in HD100. Tr336 (Martin). The upper arm of HD103 is picking up and keeping together a Latino community in east Dallas. Tr337.

602. Arrington used Plan H288 as an example of a plan that showed it was possible to create more minority opportunity in Dallas County to recognize the minority population growth. US-352 at 18. He opined that Plan H288 created four African-American districts (HD100, 109, 110, 111) and four Hispanic districts (HD102, 103, 104, 105), though "the %SSVR is low in two of the Hispanic districts, so they might be considered multi-race districts in which Hispanics and Blacks would compete in the Democratic primary and vote together in the general election." *Id.* He further notes that it leaves two open seats—the two weak Hispanic districts HD102 and HD105—and pairs numerous incumbents (both Republican with Republican and Republican with Democrat, but he felt the pairings were difficult to avoid given the population changes. *Id.*

603. Comparing Plan H288 with Plan H283 using 2005-2009 ACS data, Plan H283 has one HCVAP-

majority district (HD104), while Plan H288 has none, and Plan H283 has three BCVAPmajority districts (HD109, 110, and 111), while Plan H288 has two (HD109 and 110), though HD111 is right at 50% using combined BCVAP. However, both plans have four districts that are over 40% BVAP (HD100, 109, 110, 111), which is the criteria legislators were using for defining African-American opportunity districts. In terms of 50% SSVR, Plan H283 has one (HD104) and Plan H288 has none. Plan H288 creates five strongly Anglo districts in terms of Anglo CVAP using 2005-2009 ACS data, with HD108 being 78.5% Anglo CVAP, HD112 being 73.2% Anglo CVAP, HD113 being 64.1% Anglo CVAP, HD114 being 76% Anglo CVAP, and HD115 being 65.8% Anglo CVAP. As noted HD101 remains 61.1% Anglo CVAP, similar to its benchmark numbers and configuration.

604. Plan H205 (proposed by MALC) has 25 districts in Dallas and Tarrant Counties (three districts span both counties, and thus it breaks the County Line Rule). In Dallas County, it would maintain the African-American districts (HD100 46.9% BCVAP; HD109, HD110, and HD111 all above 50% BCVAP) and the Latino districts (HD103 (43.8% HCVAP) and HD104 (56.4% HCVAP)). It would create minority-majority CVAP HD102 in northeastern Dallas County, with 48.8% Anglo CVAP (and 25.8% HCVAP, 18.9% BCVAP, and 4.1% Asian CVAP). HD107 is majority-Anglo (52.7%) CVAP using 2005-2009 ACS data, but is majority-minority CVAP (46.8% Anglo CVAP) using 2008-2012 ACS data. D-109. H205 violates the County Line Rule by joining districts between Dallas and Tarrant Counties and also joining

some population of Dallas County with Kaufman County.

605. Dr. Engstrom (Joint Expert Ex. E-7) concluded that Latino voters have been highly cohesive in their support of Latino candidates with the Democratic Party nomination in the general elections. All five candidates received their strong support (83.8% -90.3% bivariate and 81.1% -88.1% multivariate). The only Latino candidate that was the Republican nominee in a general election was Guzman and she was not supported by Latino voters (17.4% bivariate and 18.6% multivariate). All Latino candidates in Democratic primaries also received strong Latino support (71.5%-84.7% bivariate and 64.7-87.8% multivariate). Latinos voting in the Republican primary did support the Latino candidate for Railroad Commissioner, but gave only a bare majority of support for the Latino candidate seeking the Republican nomination for Governor (50.5% bivariate, but multivariate shows only 32.6%). Non-Latino voters overall provided majority support for four of the five Latino candidates favored by Latino voters in the general elections, according to bivariate analysis, but this appears to be a function of the strong African-American support for these candidates. All five are estimated to have received over 99% of African-American votes in the multivariate analysis. The estimated support from other voters ranges from 22.1% to 29.4%. The only Latino Republican candidate received less than a majority of the support of the non-Latino voters overall, but in the multivariate analysis, her African-American support was less than 1% while that of other voters was 72.1%. Non-Latino voters did not provide majority support for any Latinos seeking

nominations in the Democratic primaries. In the multivariate analysis, African-Americans provided a majority of their support for only one of the Latino candidates favored by Latinos, and other voters provided majorities of their votes to only two of them. In the Republican primaries, non-Latino voters, both African-American and others, did not support either Latino candidate.

606. Engstrom's analyses reveal that Latinos in Dallas County are very cohesive in their candidate preferences for Latino candidates, and that preference is shared by African Americans but not other voters. The analysis of Democratic primaries shows Latinos are very cohesive in their preference for Latino candidates, but these preferences are not generally shared by the rest of primary voters.

607. In Engstrom's corrected rebuttal report (docket no. 307-1), he found racially polarized voting in Dallas County. In the general elections, Latinos were very cohesive in their support for Latino candidates with the Democratic party nomination, and that preference was shared by African Americans, but not by other/Anglo voters, who did not cast as much as 30% of their votes in favor of the candidates. Latinos are also very cohesive in their support for the Latino candidate in the Democratic primaries, but these preferences were not shared by non-Latinos, with African-Americans being least likely to share the preference.

608. Rep. Anchia has seen examples of Latinos and African-Americans being cohesive in Dallas. Anchia depo. at 116-117. He believes they are cohesive more often than not. Anchia depo. at 117, 163.

609. Juanita Wallace, a long-time resident of Dallas, offered lay testimony that Black and Latino voters work together to elect candidates, including county commissioner Elba Garcia, who got significant support from black voters. TrJ568-69 (Wallace). Wallace testified that there are similar issues and challenges facing Black and Latino voters in Dallas—transportation, the criminal justice system, and education. TrJ569-72. Wallace has not reviewed election data showing the breakdown of voting for particular candidates by minority groups. Tr582 (Wallace).

610. Raul Magdaleno, a resident of Dallas, testified to the coalition in Dallas between Latinos and African Americans. TrJ1134. He works closely with the community and sees that they have a lot of issues in common, the three primary issues being education, health care, and economic disparities. *Id.* He agrees that the populace in Dallas votes by issue rather than by racial coalition. TrJ1140. When Marc Veasey ran against Domingo Garcia, the African Americans supported Garcia, a Hispanic. TrJ1141. When Jason Villalba ran in HD114, the Latino Republicans—just a very few—supported him. *Id.*

611. Wallace testified that there is official discrimination against Hispanics and African Americans in Dallas County, which she knows because part of her job was to listen to complaints of discrimination, and they would investigate. TrJ573. She testified that minority voters are still underrepresented in Dallas. TrJ574. She has encountered people who lack photo ID that would be affected by voter ID. TrJ575. She is aware of Abbott's campaigning with Ted Nugent, and feels he did not

denounce the comment Nugent made. *Id.* The Dallas branch of the NAACP started a petition over this and sent it to Abbott and DOJ. TrJ577.

612. Magdaleno testified that he has not gotten favorable help from elected officials in Dallas when seeking help for the Latino and African-American communities in Dallas. TrJ1135. When people have not gotten help from their congressperson, such as Pete Sessions, he has gone through Congresswoman Johnson's office, and they have been very supportive. TrJ1136. When Magdaleno was getting an award from the Park Cities Republican Women's Organization, Pete Sessions responded to a question about immigration, stating that "the solution to it was to round them up like dogs and send them back." TrJ1138. This was seven years ago, but Sessions is still in office. Congresswoman Johnson helped him get his citizenship (he was her constituent then). TrJ1139. Magdaleno says he has not really experienced racial discrimination, but more economic discrimination. He says discrimination is against poor people regardless of their ethnicity. TrJ1142. The concerns he listed for the coalition of blacks and Hispanics also apply to the poor Anglo population of Dallas. *Id.* But in Dallas it tends to be more prevalent in the African-American and Latino communities, which are poverty-stricken communities. TrJ1143. So they are affected more deeply than the Anglo communities in Dallas. *Id.*

613. Rep. Anchia has heard complaints from constituents (fewer than 10) in Dallas County about Spanish-language materials not being available at polling locations. Anchia depo. at 75.

614. 54.8% of Hispanics in Dallas County lack a high school education (compared to 25.1% of the total

population of Dallas County). Joint Expert Ex. E-1 (Chapa Report) Table 4. The per capita income for Hispanics was $12,727, compared to $43,103 for non-Hispanic Anglos. *Id.* Table 5. 33.24% of Hispanic children live in poverty, compared to 7.01% of non-Latino Anglo children. Joint Expert Ex. E-9 (Gonzalez-Baker Report) Table 8.

615. The HCVAP of Dallas County in 2010 was estimated to be 19.17% (using 2005-2009 ACS data), yet Latinos have only 2/14 districts (14%) in Plan H283. Latino representation is not proportional.

616. Dallas County lost two districts and four Republicans were paired because all Democrats represented minority districts and thus mapdrawers felt they could not be paired.

617. Despite the decline in Anglo growth and increase in minority growth, Plan H283 maintains only the six existing districts represented by minority Democrats and eliminates emerging minority districts.

618. Downton used racial shading to draw all of the minority districts in Dallas County. Downton drew lines and split precincts based on race to put Anglos in HD105 (which had an Anglo Republican incumbent) and put Latinos in HD103 and HD104. He was told to pair Anderson and Harper-Brown, and thus HD105 extends south into HD104 to get to Anderson's house, but this caused Downton to have to use race and split precincts to keep HD104 at 50% SSVR. This configuration also eliminated emerging minority coalition district HD106.

Tarrant County

619. In Plan H100, Tarrant County had ten districts (HD90, HD91, HD92, HD93, HD94, HD95, HD96, HD97, HD98, and HD99). It had one African-American opportunity district, HD95 (BCVAP 54.2%), which was represented by Marc Veasey (African American, Democrat). And it had one Latino district, HD90, which was represented by Lon Burnam (Anglo, Democrat). HD90 was 47.9% HCVAP using 2005-2009 ACS data and 49.5% (+/- 2) HCVAP using 2008-2012 ACS data. Except for HD90, HD93, and HD95, all benchmark districts were majority Anglo VAP.

620. Benchmark HD93 (represented by Anglo Republican Nash) was 53% Black + Hispanic VAP (and only 37.9% Anglo VAP). HD93 was 50.5% (+/1 1.3) Anglo CVAP using 2005-2009 ACS data but only 46.9 Anglo CVAP using 2008-2012 ACS data. Using 2005-2009 ACS data, B+HCVAP was 41.7% and using 2008-2012 ACS data, B+HCVAP was 43.4%. HD93 elected Democrat Paula Pierson in 2006 and 2008. However, Republican Nash defeated Pierson in 2010 by 431 votes.

621. Benchmark HD96 was minority-majority in terms of total population (Anglo population was 49%), but was majority-Anglo VAP (53.6%) and CVAP (61.4% using 2005-2009 ACS data). In HD96, Democrat Chris Turner defeated Republican incumbent Bill Zedler in 2008, but Zedler then defeated Turner in 2010.

622. Thus, at the time of redistricting, two minority districts HD90 and HD95 were represented by Democrats, and the other eight districts were represented by Anglo Republicans.

623. In the last decade, Tarrant County grew by 362,815 residents, but only 41,882 of them were Anglo, meaning minority population growth accounted for almost 89% of Tarrant County's population growth. Joint Expert Ex. E-5 (Martin Report) at 10; TrJ1432 (Korbel). The Hispanic population increased by 197,687; African-American population increased by 79,809; and Asian population increased by 31,321. Joint Expert Ex. E-5 (Martin Report) at 10. Tarrant County gained one seat, so HD101 from Dallas County was moved to Tarrant County. But no new minority opportunities were created, and Plaintiffs' expert Korbel testified that two districts where minorities might have had a chance to elect their representatives of choice were eliminated. TrJ1433. Martin opined that the enacted map merely maintained the status quo, preserving the two effective minority districts (HD90 and HD95) (though unnecessarily packing them) and replacing HD93 with HD101 as a majority-minority coalition district. Joint Expert Ex. E-5 (Martin Report) at 10-11.

624. At the start of redistricting, Solomons asked Rep. Charlie Geren, a member of the HRC, to take the lead on the Tarrant County delegation map, so Geren led the Tarrant County delegation. TrJ2097 (Downton), TrJ29 (Veasey); Interiano 8-2-11 depo. (Joint Ex. J-61) at 27-28; TrJ1561 (Interiano). The members of the Tarrant County delegation met once or twice and were able to agree on the lines. TrJ13 (Veasey). Downton helped to get a consensus map. TrJ2097 (Downton); TrJ1576 (Interiano). Veasey initialed a map of his district HD95 to show his approval. TrJ13 (Veasey). Everyone in the Tarrant County delegation agreed on their districts and signed

off on a delegation map (hrc1H195) in late March. TrJ14 (Veasey); D-233; US-498 (no obj); Quesada-341. This was incorporated into Plan H113, and therefore the configuration of Tarrant County in Plan H113 came from the delegation. Tr929, TrJ2099 (Downton).[20]

625. In the benchmark Plan H100, HD90 had a total SSVR of 45% (and 47.2% non-suspense SSVR). TrJ1561 (Interiano). Lon Burnam (Anglo, Democrat) was the incumbent in HD90. TrJ1562 (Interiano). In Plan H113, total SSVR dropped to 40% (41.9% non-suspense). TrJ2099 (Downton); TrJ1562 (Interiano).

626. Hanna's first retrogression memo (written around April 7) noted, "While current District 90 is short people and that likely accounts for most of the drop in SSVR, further consideration should be given to see whether the level of SSVR in the proposed plan can be raised to come closer to the level in the current plan." D-122. Hanna's second retrogression memo, written around April 12, raises the same point. D-327; TrJ2145-46 (Downton).

627. At the April 15 HRC hearing, Luis Figueroa of MALDEF testified in opposition to Plan H113 and in support of MALDEF's Plan H115. He stated, "[W]e can draw Section 2 compliant districts in West Texas, in the Valley, and increase populations in Houston [in] Representative Farrar's district [HD148] and in Lon

---

[20] Veasey testified that when the first House plan (Plan H113) was publicly released, Veasey's district HD95 was different than the one he signed off on. TrJ14 (Veasey). However, Veasey was more likely referring to changes made later in Plan H153 because his district in Plan H113 is the same as the district he approved (D-233).

Burnam's district [HD90] to create a clear Latino CVAP majority district." D-595 at 34. In Plan H115, HD90 had 46.8% total SSVR, 48.9% non-suspense SSVR, and 51.7% HCVAP using 2005-2009 ACS data. Joint Map Ex. J-23. In response to questioning, Figueroa also pointed out that in HD90 in Tarrant County, Solomons' proposal reduced the (nonsuspense) SSVR from 47.2% to 41.9% while MALDEF was able to increase it by almost ten points over Solomons' map. D-595 at 32. Figueroa said MALDEF wanted to "ensure that that district becomes a Latino citizen voting age population" majority district. D-595 at 66.

628. At the April 17 HRC hearing, Jose Chavez testified on behalf of himself that Plan H113 did not reflect the population changes. He noted that Tarrant County had seen tremendous minority population growth. He stated that HD90, 93, 95, and 96 were performing minority districts, and although there was a new seat added to Tarrant County, there were only three performing districts—HD90, 95, and H101—in Tarrant County in Plan H113. He said HD90 and HD95 were packed by taking voters from HD96 (which had a combined minority population over 50%). He said they packed three districts and cracked two to end up with only the three performing districts. A member of the HRC noted that HD90 had 40% SSVR, which was down from the benchmark, but it only concerned him somewhat because the district would probably perform given its consistent performance. He also noted that it seemed inconsistent with the growth pattern for the SSVR to decrease.

629. In response to Figueroa's testimony, Hanna's concerns, and to offset the loss of SSVR-majority district HD33 in Nueces County, the mapdrawers

made changes to HD90 to increase its SSVR. Tr930, TrJ2097-99, TrJ2145-46 (Downton); Tr1431, TrJ1562 (Interiano). Downton made changes to bring HD90 over 50% SSVR; those changes involved including new areas with Hispanic population in the southeast portion of HD90 (areas that had been in Veasey's district HD95) and reducing the non-Hispanic population to the far south (which was put into HD95) and in the western part of the district (which was put into HD99, represented by Anglo Republican Charlie Geren). TrJ2101 (Downton). Some population was also exchanged between HD90 and HD93 in the northeast part of the district. Burnam and Veasey were not consulted about the changes before they were made, and they later opposed the changes. Tr930, TrJ2101 (Downton). These changes (reflected in Plan H134) (along with a minor change moving some population from HD99 to HD97 in Plan H151) were incorporated into the plan (Plan H153) at the April 19 HRC meeting.

630. Veasey testified that there were some key African-American neighborhoods that were taken out of his district HD95 and some areas that were added in, and he was "completely in the dark about it" and "very upset." TrJ14. Veasey said that he did not know why the changes were made because no one came to him and no one reached out to explain the changes to him. TrJ15. Veasey was on the HRC and would have been very accessible. TrJ15-16. He felt that the process was secret and there was no transparency. TrJ15.

631. In Hanna's third retrogression memo (written about April 20) concerning Plan H153, Hanna noted that the total SSVR of HD90 was 47.9% and there were no retrogression issues identified. D-123; TrJ2146

(Downton). Downton testified that he would have been using non-suspense SSVR on RedAppl, which was 50.1%, to measure the SSVR of the district. TrJ2146.

632. On April 27 at the floor debate, when Solomons laid out Plan H153, he said, "Specifically we increased the SSR-SSVR- in District 90 in Tarrant County and District 148 in Harris County. Both of these changes were made at the request of MALDEF." D-13 at S100; D-190 at 632; TrJ32 (Veasey). Rep. Veasey noted that HD101 was a new coalition district but questioned why HD93 in Tarrant County was retrogressed. Solomons stated it was an agreed, drop-in map from the delegation. D-13 at S116. Veasey later stated that the members had not approved of the entire County map, only their districts. *Id.* at S163. He further noted that his and Burnam's districts had been changed without their approval, but with the approval of people in Anglo districts. *Id.* at S117. Rep. Geren responded that HD93 was a minority district that became HD101, and that the new HD93 did not resemble the old HD93 at all, and that MALDEF asked them to increase the HVAP of HD90. *Id.* Veasey responded that legally that meant nothing because HD90 was already an opportunity district that had been performing, and HD90 now came far into his district HD95. *Id.* Geren responded that "it has more Hispanic opportunity now than what it was." *Id.* at S118. Solomons said the SSVR numbers of HD90 and HD148 "were increased slightly . . . because we were advised basically we needed to do that just for additional protection to make sure that they were where they needed to be." *Id.* Solomons said the only reason they increased the SSVR of HD90 was because

MALDEF requested it and its SSVR was only at 45% before. D-13 at S119-20.

633. Rep. Veasey proposed Amendment No. 10 (H120) for Tarrant County that would have created a new minority opportunity district (HD96) in Tarrant County. D-13 at S160; D-190 at 106-07. He said his map more accurately reflected the growth there. Veasey said that there were four majority Black and Hispanic districts in the benchmark, and that H153 dropped a minority opportunity district from the benchmark Tarrant County (from 4 to 3) and packed his district and Burnam's unnecessarily, despite the large minority growth. Veasey further noted that Tarrant County had agreed on a map but his (HD95) and Rep. Burnam's district (HD90), the two most minority districts, had been changed. D-13 at S161. Rep. Truitt (Anglo, Republican) complained that Veasey's map split communities of interest in northeast Tarrant County. *Id.* at S162. Veasey stated, "There's a big line going through the middle of my district. Representative Geren picked up the Como community, and I think everybody over there knows Charlie [Geren] and I think they are more comfortable being represented by Lon [Burnam]. But if you look at the major changes that took place from after the point in which we signed off, the big change that has happened in the districts were represented by the minorities, and we didn't approve them." *Id.* at S163. Burnam and Veasey stated that they did not approve of the whole Tarrant County map, only their districts, which were then changed. *Id.* Burnam stated that his district has essentially been the same since it was first created by the federal court in 1978. *Id.* He also stated that, "Since the creation of this district, neighborhoods

that are incredibly important and protected by virtue of their minority status in District 90 include the Lake Como community." *Id.* Como had been moved into HD99, represented by Anglo Republican Geren.) Burnam also complained that his neighborhood was split. *Id.* Veasey further asserted that HD96, represented by Zedler (Anglo Republican), was "one of the fastest growing minority areas in the entire county" and they had "a shot to decide who gets elected in that district," but "[u]nder the plan that was voted out, they do not have that opportunity anymore" and "[t]hey've becomecompletely irrelevant under what was voted out [of the HRC]." Geren moved to table the amendment, stating that it split communities of interest and dropped the HVAP of HD90 below 50%, and that there were only three minority districts in the benchmark. *Id.* at S164-65. Burnam stated that he was elected in a district that was 47.2% SSVR, and although the committee map raised it over 50%, it was done by making his district 8,200 plus people below the ideal population and by taking the Lake Como community out, which is an overwhelming minority-majority community, and put into Geren's district. *Id.* at S165. Burnam and Veasey argued that the map was retrogressive, that HD90 was already effective, and that the map did not represent Tarrant county. They also asserted that HD96 was an effective coalition district when there was good turnout, and it had been cracked to assure reelection of a white representative. *Id.* at S167. Geren pointed out that changes were also made to districts represented by Nash, Patrick, and Shelton, but Veasey said they were only "slight changes." *Id.* The amendment was tabled.

634. Burnam laid out Amendment No. 11(H203) and a perfecting Amendment No. 12 (H236) for Tarrant County. D-13 at S168; D-190 at 108-11. He said he thought they had an agreed-to plan acceptable for HD90, which was established by a federal judge in 1978. D-13 at S168. He said his plan was ugly, but it fixed HD90 and put Lake Como back. It was only 49.1% SSVR, but he said that the 50% number was arbitrary, and the DOJ had rejected using a fixed demographic percentage in favor of a functional analysis. *Id.* Burnam stated that the predominantly African-American district in Tarrant County was packed, that his district represents "the artificial nuance of just two or three percentage points in the registered Hispanic voters, when, in fact, the proposed map takes out over 10 percent of the voting population in this district, which includes the minority constituency in the Lake Como community. It rips it out and puts it in a district in far northwest Tarrant County in Azle. And while the people in Azle are wonderful folks they just don't have very much in common with my inner-city Fort Worth constituency, the Lake Como community. I'm extremely concerned that in a district that is largely a no growth district that you would put me at such a low number. It undermines the one person, one vote." *Id.* at S169. Solomons stated that there were problems with the amendment because it reduced the SSVR of HD90 below 50% (to 49.1%) and that MALDEF had testified that it needed to be above 50%. Burnam asked him if he had heard Veasey talking about the letter from representatives of the Latino community stating that the 50% criteria was not particularly important in this instance, and Solomons stated that the letter did not repudiate and take back the MALDEF testimony on

the record. Solomons stated that they were trying to be consistent and conservative about legal risk. *Id.* at S171. Burnam also asked him about the DOJ guidelines and stated that "it looks a little hypocritical to people that are looking at it closely because if you were really following the MALDEF recommendation you would create five new Hispanic districts not just call Representative Farrar's district and my district new Hispanic districts. Those two communities in Harris County and Tarrant County already vote for who they want to vote for, and those minority communities don't want to have their districts ripped up." *Id.* at S172. Solomons moved to table. Veasey and Burnam reiterated that Plan H153 was "all a contrivance to look like we're not in retrogression" and that there would be a lawsuit if the map was not changed. The proposed amendment was tabled. *Id.* at S173.

635. Rep. Martinez Fischer then set forth Amendment No. 32 (H199) focusing on Dallas and Tarrant Counties to increase the number of opportunity districts from three to five. This plan created three districts that spanned Dallas and Tarrant Counties and thus broke the County Line Rule. He stated that Plan H153 violated § 2 of the VRA by limiting the creation of minority opportunity districts. Rep. Alonzo stated it was the same plan Martinez Fischer had presented for other areas, but he was just focusing on DFW. *Id.* at S223. A statement of legal issues regarding the DFW metroplex and the April 27, 2011 letter from MALDEF stating that Plan H153 was retrogressive was made a part of the record. *Id.* at S224. The statement argued that use of the County Line Rule fenced apart minority voters in

Dallas County and Tarrant County, and that Plan H153 packed minority districts and failed to create additional minority opportunity districts, while alternative plans created up to two by unpacking districts and avoiding the County Line Rule. *Id.* at S222. The amendment was tabled. *Id.* at S230.

636. Rep. Coleman offered Plan H232. He said that almost 89% of the growth was non-Anglo in Tarrant County, and his map would maintain communities of interest and the core of effective minority opportunity districts 90 and 95, while also creating two new coalition districts, HD106 and HD96. Plan H232 moves HD106 from Dallas County into Tarrant County and turns it into a minority coalition district with 19.6% HCVAP and 26.9% BCVAP. HD90 is 44.3% HCVAP using 2005-2009 ACS data and 40.4/42.1% SSVR. HD95 is 52.9% BCVAP using 2005-2009 ACS data. HD93 and HD96 are both Anglo-CVAP majority districts, though HD96 is only 49% Anglo VAP. *See also* Joint Expert Ex. E-3 (Lichtman Report) at 12-14; Tr1230 (Lichtman).

637. Plan H283 has eleven districts in Tarrant County. Eight of the eleven districts are majority Anglo VAP. HD90 is 49.7%(+/- 2%) HCVAP using 2005-2009 ACS data and 51.6% HCVAP using 2008-2010 ACS data. It is 47.9% total/50.1% non-suspense SSVR. HD95 is 49.8% (+/-1.5) BCVAP using 2005-2009 ACS data and 49.1% BCVAP using 2008-2012 ACS data. HD93 is 66.5% Anglo CVAP using 2005-2009 ACS data and 57.8% Anglo VAP. HD96 is 62% Anglo VAP and 68.4% Anglo CVAP using 2005-2009 ACS data. Thus, both HD93 and HD96 are solid Anglo districts. The new HD101 is 29.5% Anglo VAP and 42.9% Anglo CVAP, 28% Black CVAP, 19.7% Hispanic

CVAP, and 7.8% Asian CVAP using 2005-2009 ACS data. The new HD101 elected Chris Turner, who is the Latino candidate of choice. TrJ612 (Lopez).

638. Dr. Murray opined that Plan H283 creates minimal opportunities for minority voters. Tr1052. He opined that Tarrant County gained a seat and has had very substantial minority growth, and had as many as four districts (HD90, 93, 95, and 96) where minorities in combination with coalitions have been able to elect candidates. Tr1053 (Murray); Joint Expert Ex. E-4 (Murray Report) at 34. Murray opined that Plan H283 locks in a 2/9 delegation with just two districts where Black and Hispanic voters will have an opportunity to elect, despite the fact that they are the fastest growing segment of the county population. Tr1052-53.

639. Martin opined that Plan H283 packs minority opportunity districts HD90 and HD95 to prevent creation of a majority-minority district HD96, which had a rapidly growing minority population in the benchmark plan and had elected the minority candidate of choice in 2008. He stated that HD90 was already an effective Latino district, but H283 extended it into existing HD95 and HD96 to meet an arbitrary and unnecessary 50% SSVR, and that HD95 was already an effective African-American district, but it was extended west of I-35 to take in areas of African-American growth to protect the Republican incumbent of HD96. Martin opined that new coalition district HD101 simply replaces existing HD93. He noted that benchmark HD93 was 55% B+HVAP and 37.9% Anglo VAP and new HD101 has only a 29.5% Anglo VAP and contains the bulk of HD93's Arlington and Grand Prairie population, but is shifted south to take in minority precincts from existing HD96 to prevent its

creation as a majority-minority district. Joint Expert Ex. E-5 (Martin Report) at 10-11.

640. Plaintiffs' expert Korbel testified that HD93 became a very odd-shaped district cutting across the county from its eastern border, through Fort Worth, and up to the northern border of the County. TrJ1434. He opined that the minority population in eastern Tarrant County used to be part of HD93 and now it is joined with north Tarrant County near Denton, which is Anglo, and that dilutes the minority vote. TrJ1434-36 (Korbel). HD93 is also one of the least compact districts in the plan. TrJ1437 (Korbel). Korbel testified that HD96 in the southern portion of the County was developing into a minority district, but some of its heavily minority population in the east is placed into HD101 and that stops its growth. TrJ1435 (Korbel). Korbel did not consider the role of incumbents or city boundaries as reasons for the lines. TrJ1460-61 (Korbel).

641. Rep. Burnam testified that HD93 is the leftover district made out of nothing else that meanders across Tarrant County, includes many municipalities, and prevents a third majority-minority district inside the loop. Burnam depo. at 242-43.

642. Dr. Kousser testified that the shape of HD90 (Burnam's district) is suspect, and was drawn to capture as many Latinos as possible while avoiding non-Latinos. Tr248; Joint Expert Ex. E-2 (Kousser Report) at 99. He noted that HD90 was performing for Latinos, and had a 64.9% VAP, 47.9% HCVAP, and 47.2% non-suspense SSVR, but Plan H283 raised its HVAP to 71%, its HCVAP to 49.7%, and its SSVR to 50.1%. Joint Expert Ex. E-2 (Kousser Report) at 98. This was accomplished by subtracting non-Latino

population, making this district the smallest in the State and giving it the second-to-lowest perimeter-to-area compactness score (.079) in the State. Joint Expert Ex. E-2 (Kousser Report) at 99-102.

643. HD90 is underpopulated by 4.9% and is the smallest district in Plan H283. HD95 is also underpopulated by 3.58%. Potential coalition district HD101 is underpopulated by 1.77%. Six of the Anglo districts are underpopulated and two are overpopulated.

644. In his report (Joint Expert Ex. E-7), Dr. Engstrom found that Latinos are highly cohesive in support of Latino candidates with Democratic party nominations in general elections—all five had strong support (all >90% bivariate and 86.1-98.3 multivariate). The Latino Republican, Guzman, was not supported. All Latino candidates in Democratic primaries also received solid support from Latino voters (74.9% - 99 % bivariate; 64.3% -85% multi). Non-Latinos were generally not supportive of the Latino candidates. In general elections they did not share the candidate preferences of Latino voters (35.4% to 40.1% bivariate). The multivariate analysis showed that African Americans did support these candidates (>99%), but other voters/Anglos did not (17.6% to 25.7%). The only Republican candidate that was a Latino did receive an estimated 60% support from non-Latino voters in bivariate analysis, but the multivariate analysis showed a deep divide between African Americans (less than 1% support) and other voters (76.9%). Non-Latinos did not provide a majority of their votes to any of the five Latino candidates preferred by Latino voters in the Democratic primaries. African-American voters provided a

majority of their votes to one of the five according to multivariate analysis, as did the other voters. In the Republican primaries, non-Latino voters, both African-Americans and others, did not support either of the Latino candidates. The analyses reveal that Latino voters in Tarrant County have been very cohesive in their candidate preferences for Latino candidates, and that preference is shared by African-Americans in the general elections studied, but not by other voters. Analysis of the Democratic primary elections shows Latinos are very cohesive in their preference for Latino candidates, but these preferences are not generally shared by the rest of primary voters.

645. In his corrected rebuttal report (docket no. 307-1), Dr. Engstrom found racially polarized voting in Tarrant County. He found that in the general elections Latinos were very cohesive in support of Latino candidates with the Democratic party nomination, and that preference was not shared by non-Latino voters in any of the elections. While African-American voters were strongly supportive of these Latino candidates, the other voters preferred the opponent in every instance. Latinos are also strongly cohesive in support of Latino candidates in the Democratic primary elections, but that preference was not shared by non-Latino voters, with African-American and other voters supporting the Latino candidate in only one of six primaries.

646. Plan H201 has the same Tarrant County configuration as the enacted plan. MALC's Plan H205 has 25 districts in Dallas and Tarrant Counties, with three districts spanning both counties (and thus violating the County Line Rule). Joint Map Ex. J-26.

It maintained HD90 (45.5% HCVAP using 2005-2009 ACS data) and HD95 (51% BCVAP using 2005-2009 ACS data). HD107, which spans Dallas and Tarrant Counties, has an Anglo CVAP of 52.7% using 2005-2009 ACS data and 46.8% using 2008-2012 ACS data. D-108.

647. Perez Plaintiffs offer Tarrant County Plan H289, an eleven-district Tarrant County Low Deviation (1.08% total deviation) Plan. Joint Map Ex. J-34. Martin stated that this plan preserved HD95 as an African-American district (it is 52.2% BCVAP using 2005-2009 ACS data), preserves HD90 as an effective Latino opportunity district, replaces existing HD93 with HD106 as an effective majority-minority coalition district, and creates HD96 as a proposed additional minority district. Joint Expert Ex. E-5 at 11. This plan is very similar to H232 in Tarrant County. HD90 is the same as in H232 (44.3% HCVAP using 2005-2009 ACS data and 40.4/42.1% SSVR). HD95 is similar, with 52.2% BCVAP. Proposed HD106 is 43.7% Anglo CVAP, 19.6% HCVAP, and 26.9% Black Alone CVAP (27.4% combined). HD93 and HD96 are both Anglo-CVAP majority districts, though HD96 is only 48.8% Anglo VAP.

648. Task Force Plan H292 moves HD115 into Tarrant County, and it is 42.9% Anglo CVAP using 2005-2009 ACS data (47.7% B+HCVAP) and 37.3% Anglo CVAP using 2008-2012 ACS data (50.7% B+HCVAP). Joint Map Ex. J-37. HD90 is 49.7% (+/- 2) HCVAP using 2005-2009 ACS data and 51.6% HCVAP using 2008-2012 ACS data. HD95 is 49.8% (+/- 1.5) BCVAP using 2005-2009 ACS data and 49.1% BCVAP using 2008-2012 ACS data. Joint Map Ex. J-37; D-111. All other districts are majority-Anglo VAP.

649. Terrysa Guerra, a campaign staffer and consultant who worked for Chris Turner in Tarrant County in 2008 and 2010, testified about "black/brown coalitions" in Tarrant County. Tr1146. Turner won election in HD96 in 2008, but lost in 2010. Guerra testified that these groups existed in 2008 and were working on different neighborhood issues and other issues not related to a specific candidate. Tr1146. She testified this coalition was successful in 2008 and also elected Senator Wendy Davis in that area. Tr1147. She stated that they were not successful in 2010, and the tone of the 2010 election was "venomous." Tr1148. She testified that Turner's skin was darkened and he was given a gap in his teeth in Zedler's 2010 opposition campaign materials, and they tried to link him to President Obama. Tr1148-51. In one mail piece Turner is wearing a Mexican flag button. Tr1152 (Guerra); NAACP-609. She said these mail pieces only went to Anglo households. Tr1150-51. Guerra testified that Zedler was a member of the Tea Party, which she had seen making race an issue in elections. Tr1149.

650. In Tarrant County, 47% of Hispanics lack a high school education. Joint Expert Ex. E-1 (Chapa report) Table 4. The per capita income for Hispanics was $14,489, compared to $35,179 for non-Hispanic Anglos. *Id.* Table 5. 28.93% of Hispanic children live in poverty, compared to 13.71% of non-Hispanic Anglo children. Joint Expert Ex. E-9 (Gonzalez-Baker Report) Table 8.

651. Tarrant County went from 11.37% HCVAP in 2000 to 13.99% under the 2005-2009 ACS Special Tabulation (D-51).

652. Due to minority population growth, Tarrant County gained a district, but the Legislature

maintained the status quo, keeping a Latino district, an African-American district, and a potential coalition district.

653. Mapdrawers increased the SSVR of HD90 above 50% (non-suspense) to offset the loss of HD33 in Nueces County (and perhaps also in response to concerns raised by MALDEF and Hanna about potential retrogression). Downton made these changes based on race. Mapdrawers applied the 50% SSVR threshold without regard to whether the district was already performing for minorities.

McLennan County/Waco/HD57

654. The McLennan County/Waco district (at the time HD35) was the subject of litigation over at-large districts in *Graves v. Barnes II*, 378 F. Supp. 640 (W.D. Tex. 1974). TrJ1441 (Korbel). In that opinion, the court stated, "All of these factors—past history of discrimination resulting in continuing lack of minority political participation, demographic and geographic factors, the failure of the few bids of minority candidates, and the present representatives' lack of commitment to the particularized needs of minorities—present a persuasive pattern of cancellation and minimization of minority voting strength." The court held that the use of multi-member districts in McLennan County was unconstitutional.

655. What is now HD57 was drawn so that minorities could elect representatives of their choice. TrJ1442 (Korbel). That district has performed for minorities. TrJ1443 (Korbel). Plaintiffs provided lay testimony from NAACP-member and County Commissioner Lester Leon Gibson. He testified that the minority community (African-American, Hispanic,

and others) vote for the candidate that will represent their interests, regardless of their color. They are very supportive of minorities in that area. TrJ1828 (Gibson). The minority community supported Rep. Jim Dunnam (Democrat), who represented HD57 from 1998 to 2010, and those who won prior to him, who were responsive to the concerns of the minority community in Waco. TrJ1828. Dunnam lost the election in 2010 to Anglo Republican Marva Beck.

656. In Plan H100, HD56 was located wholly within McLennan County. HD57 joined the remainder of McLennan County with Falls, Robertson, Leon, and Madison Counties. The City of Waco was divided between districts 56 and 57. HD14 was wholly within Brazos County and included most of Bryan/College Station, and the remainder of Brazos County was joined with HD17 to the southwest. Brazos County was not connected to McLennan County in a district.

657. In 2010, HD57 was majority minority in terms of total population (45.5% Anglo population). Red-202 Report. However, it was majority Anglo VAP (50.7%) and majority Anglo CVAP (57.3% using 2005-2009 ACS data and 55.8% using 2008-2012 ACS data). D-100 (Red-106 Report; Red-116 Report).

658. HD56 was 12,339 people underpopulated. HD57 was 23,076 people underpopulated. HD14 was 14,441 people overpopulated. Red-202 Report.

659. In Plan H283, HD56 remains wholly within McLennan County and includes large portions of Waco. HD14 remains in Brazos County and includes much, but not all of Bryan/College Station. Although it has a somewhat odd shape, many of the lines track city boundaries and a river. HD12 (which takes the

place of HD57) moves west and now joins the remainder of McLennan County to the remainder of Brazos County, spanning Limestone County, Falls County, and Robertson County in between. MALC-132 (map). All three districts are majority Anglo in terms of total population, VAP, and CVAP. HD12 is 55.2% Anglo in terms of total population.

660. Instead of underpopulated HD56 simply gaining population from HD57, mapdrawers shifted population between the two districts along their boundary in McLennan County in Plan H283. The mapdrawers removed largely minority areas of Waco (about 23,000 people who were 70% minority) from HD57 (renumbered HD12) and replaced them with more Anglo areas (about 20,000 people who were 80% Anglo). TrJ1444 (Korbel). A significant portion of minority population is moved out, including minority Precincts 12 and 14. TrJ1444; TrJ1841 (Gibson). This split minority communities of interest and cracked minority voting strength. TrJ1444 (Korbel); TrJ1837 (Gibson). Gibson testified that if HD57 were restored it could again elect minority candidates of choice. TrJ1838.

661. MALC has provided *Gingles* demonstration map Plan H363 that is a three-district plug-in plan. MALC-135 (H363 map) (Plan H367 is the same). This map joins minority population in Bryan/College Station in Brazos County with minority population in Waco in McLennan County in HD57. TrJ1445 (Korbel); MALC-136. Thus, by leaving benchmark HD57 essentially intact and changing the border with HD14 in Brazos County, HD57 is 58.7% B+HVAP. TrJ1445 (Korbel); Red-100 Report. Using 2008-2012

ACS data, HD57 is majority B+HCVAP (HCVAP is 23.7% and BCVAP is 29.1%). MALC-137.

662. Martin noted that benchmark HD57, a 53.2% Black + Hispanic district in terms of total population that had elected the minority candidate of choice until the 2010 election, was eliminated and effectively replaced by a 59.2% Anglo VAP HD12. Joint Expert Ex. E-5 at 14. He notes that in statewide Plan H232, which was offered by Rep. Coleman during the session, HD57 is drawn as a Waco-based district that is only 49.5% Anglo in terms of total population. *Id.* at 14. In Plan H232, HD57 is wholly within McLennan County, and it is 55.3% Anglo VAP and 63.3% Anglo CVAP using 2005-2009 ACS data. Joint Map Ex. J-28; Red-106 Report.

663. Gibson testified that there is a "black and brown" coalition in McLennan County. TrJ1829-30 (Gibson). They have been able to come up with a common candidate for their support. TrJ1830. They have had success—Gibson, when he ran for school board, had the support of the coalition, and also as county commissioner. *Id.* He testified that the African-American community has supported Latino candidates with success. *Id.* Other examples are school board members, like Sunny Lozano, a Justice of the Peace, and a constable. *Id.*

664. HD57, a majority-minority district in terms of total population (but not HVAP or HCVAP) had been electing minority candidates of choice until the 2010 election, when it elected an Anglo Republican. In Plan H283, population was shifted and minority population was split in Waco, and HD57 was replaced with an Anglo-majority district (55.2% Anglo in terms of total population and 59.9% Anglo VAP).

665. Plaintiffs offer demonstration Plan H363 to show that a majority-minority coalition district (B+HCVAP majority) could be drawn affecting only three districts in Plan H283.

666. Plaintiffs presented lay testimony of a black and brown coalition. There is no expert testimony concerning racially polarized voting in McLennan County specifically. There is evidence of racially polarized voting and African-American and Latino cohesion in general elections statewide (*e.g.*, Joint Expert Ex. E-2 (Kousser Report)) and in Bell County, which is directly adjacent to McLennan County and Falls County.

Bell and Lampasas Counties

667. In Plan H100, two districts, HD54 and HD55, were wholly contained within Bell, Burnet, and Lampasas Counties.

668. HD54 included all of Lampasas and Burnet Counties and almost all of the City of Killeen in Bell County. TrJ1726 (Aycock); D-340. Jimmie Don Aycock (Anglo, Republican), who lives in Killeen, represented HD54. TrJ1725 (Aycock). HD 54 was 48.5% Anglo (*i.e.*, majority minority) in terms of total population and was 53.4% Anglo (*i.e.*, majority Anglo) in terms of VAP. Using 2005-2009 ACS data, benchmark HD54 was Anglo-majority CVAP (it was 14.8% HCVAP, 20.5% Black alone CVAP, 2.1% Asian alone CVAP, and 59.4% Anglo CVAP). Red-106 Report. It was 55.3% Anglo CVAP using 2008-2012 ACS data. D-100.

669. HD55 included the rest of Bell County, including the cities of Temple and Belton. D-340. HD55 was 62.1% Anglo in terms of total population

and 66.4% Anglo VAP. Red-202 Report. The HD55 incumbent was Ralph Sheffield (Anglo, Republican).

670. HD54 was overpopulated by 28,815 persons, and HD55 was overpopulated by 8,573. Minority population growth accounted for more than 70% of the growth in Bell and Lampasas Counties between 2000 and 2010. MALC-151. Due to population growth in Bell and Burnet Counties, the two counties could not be joined in a house district, so Burnet County was removed from HD54. TrJ1727 (Aycock).

671. Aycock requested to be on the HRC because he wanted input into how HD54 was drawn. He was senior to Sheffield, the HD55 incumbent, so he took the lead in drawing the lines between HD54 and HD55. TrJ1729 (Aycock). Aycock worked with Sheffield. TrJ1730 (Aycock). They worked well together and reached a compromise map for their districts. *Id.* Because Aycock lost Burnet County, which was a heavily Republican portion of his district, he was anxious to gain Republican strength and looked for places that could be done, like Salado, which Sheffield did not want to give up. TrJ1731 (Aycock). Sheffield gave Aycock Salado as part of their compromise. Incumbency/Republican protection was a high priority, and Aycock "was looking for Republican voters who would vote for [him] primarily." TrJ1741-44 (Aycock).

672. Aycock was responsible for the lines of districts HD54 and HD55 in Plan H283. TrJ1770 (Aycock). He went to Downton when he needed assistance moving the lines; he would direct Downton where to move lines. TrJ1755 (Aycock) ("I knew where the voters were and knew where I wanted to draw

those lines"). Aycock denied drawing the lines on the basis of race. *Id.*

673. Aycock is not a lawyer and has no VRA expertise. He relied on staff to tell him if the districts complied with the VRA and other legal requirements. TrJ1741 (Aycock). Aycock stated that he looked at whether he had to create a coalition district but "the combined minority populations do not exceed 50%." TrJ1766. He did not think a coalition district was required by the VRA. TrJ1769. He also stated in his deposition that a coalition district "would have probably got me unelected because I couldn't put that many Republicans together in one place." *Id.* He testified that he "sort of looked at" whether he could configure HD54 in such a way that it would create a coalition district and came to the conclusion that it could not be done. TrJ1766-67 (Aycock). He did not look at election returns in deciding not to draw a coalition district. TrJ1767.

674. On February 16, 2011, the Senate Select Committee held a hearing on redistricting to solicit public testimony and hear invited testimony. D-117 at 33; D-589 (transcript). Claudia Brown of Killeen testified about an African-American community in Bell County that she would like to see together for voting. D-589 at 37.

675. The initial configuration of districts HD54 and HD55 in Plan H113 came from Rep. Aycock. This was the configuration that remained throughout the session and is in Plan H283. In Plan H283, HD54 includes all of Lampasas County and the western part of Bell County, including the City of Harker Heights and much of the City of Killeen. Burnet County is no longer part of HD54. HD55 includes the eastern

portion of Bell County, including Temple and Belton, and the rest of Killeen and most of Fort Hood within Bell County. D-341. HD54 is 99 (.06%) above the ideal district population and HD55 is 5,461 (-3.26%) below. Red-100 Report.

676. In Plan H283, HD54 is 47.6% Anglo in terms of total population, 52.1% Anglo VAP, 15.8% HCVAP, 22.2% Black alone CVAP, 2.6% Asian alone CVAP, and 56.1% Anglo CVAP using 2005-2009 ACS data (and 52.4% Anglo using 2008-2012 ACS data). D-109; MALC-114. There were increases in all three minority populations from the benchmark. TrJ1731 (Aycock). This was due to minority growth and because HD54 no longer included Burnet County, which is more Anglo.

677. In Plan H283, HD55 is 56.9% Anglo in terms of total population, 61.3% Anglo VAP, and 64.9% Anglo CVAP (under both the 2005-2009 and 2008-2012 ACS). D-109; MALC-114.

678. During the floor debate on April 27, the Texas Legislative Black Caucus introduced Plan H202 (and the NAACP relied on this plan during trial). Plan H202 created HD54 encompassing most of the City of Killeen and the City of Harker Heights in Bell County, and HD55 includes the remainder of Bell County and all of Lampasas County. HD54 in Plan H202 is 17.7% HCVAP, 28.7% BCVAP, 3.2% Asian CVAP, .8% American Indian CVAP (and thus a combined minority CVAP of 50.4% using 2005-2009 ACS data) and 46.4% Anglo CVAP. Red-106 Report; Tr842 (Fairfax). It is a

proposed majority-minority coalition district. Tr842 (Fairfax).[21]

679. Aycock opposed Plan H202 because it connected Lampasas County to Temple/Belton in the eastern part of Bell County, instead of putting Lampasas County with the western part of Bell County/Killeen. Aycock testified that he felt that Lampasas County was more aligned with western Bell County than with Temple/Belton, so it was beneficial for them to remain in a district with Killeen. TrJ1732, TrJ1741. Aycock testified that Killeen is the largest population center accessible easily to Lampasas County, and people in Lampasas County have commonality with Killeen. TrJ1734, TrJ1741. He also noted that H202 still has a split of Killeen. TrJ1735. However, he acknowledged that the vast majority of Killeen population is in HD54. TrJ1759.

680. During the session, Rep. Martinez Fischer proposed Plan H201 and other plans that created a district combining parts of Killeen with parts of Temple and Belton in Bell County and had an Anglo CVAP of 43.7%. Aycock opposed this configuration because it included a "land bridge" joining the population of Killeen with Temple and Belton. TrJ1770 (Aycock). However, he admits that Plan H283, which he voted for, also includes land bridges in other areas. *Id.*

681. During the April 27 floor debate, Rep. Coleman introduced Plan H232 as a statewide substitute to Plan H153, which maintained HD54 and

---

[21] According to Dr. Fairfax, HD54 in 2014 would have a B+HCVAP of 53.29%. TrJ912 (Farifax). Fairfax estimated the combined B+HCVAP of HD54 in 2010 was 47.9%. NAACP-673.

HD55 wholly within Lampasas and Bell Counties. It created HD54, a proposed minority coalition district. Tr409 (Martin); Joint Map Ex. J-28. HD54 joined Lampasas County with Fort Hood and most of Killeen. Using 2005-2009 ACS data, it showed Anglo CVAP of 49.7% (+/- 1.4). Red-106 Report. BVAP is 28.4%, HVAP is 19.4%, SSVR is 13.1%, and HCVAP 17.5%. Anglo VAP is 46.6%, less than a majority. Tr410 (Martin); Red-100 Report. HD54 is drawn as a majority-minority district that reunites the Killeen and Ft. Hood community that was split by Plan H283, and when Martin drew this district for Coleman, he assumed minority voter cohesion. Tr411(Martin); Joint Expert Ex. E-5 (Martin Report) at 14. Rep. Davis testified that it made sense not to split this community up and that HD54 would be a coalition district with the possibility that the minority groups would be politically cohesive based on anecdotal experience and her analysis of election data. Y. Davis depo. at 63-65.

682. In Plan H283, the minority population of Bell County is divided between the two districts. MALC-113 (racial shading exhibit). Plan H283 fails to create a majority-minority district in Bell and Lampasas Counties. Tr408 (Martin). Minorities in Bell County do not have an opportunity to elect their candidate of choice in Plan H283. *Id.*

683. Aycock testified that he primarily wanted to maintain communities of interest and that maintaining communities of interest is important. TrJ1739-41, TrJ1762. He agreed that the City of Killeen is a community of interest. TrJ1746. The City of Killeen has elected an African-American mayor (Hancock) and a Latino mayor (Villaronga). TrJ1747 (Aycock). There was a small split of Killeen in the

benchmark, but the split was enlarged in H283 (more of Killeen voters were removed from HD54). TrJ1743 (Aycock). Aycock's assertion that it was more important to keep Lampasas County together with the City of Killeen as a community of interest (TrJ1744) than it was to keep the City of Killeen together as a community of interest is not credible. Killeen has been kept virtually whole in one district in previous plans. TrJ1403 (Korbel). The decision to split Killeen, which is more than 50% minority (TrJ1760 (Aycock)) was made to ensure that HD54 and HD55 would remain Republican and would re-elect the Republican incumbents. To accomplish this goal, Killeen was split and more of it was removed from Aycock's district, which Aycock knew meant that he was removing minority voters because Killeen is heavily minority in all areas. TrJ1744 (Aycock). About 32,000 persons (about two-thirds minority) from the northern part of Killeen were removed from HD54. TrJ1404 (Korbel). 47,000 persons from southwest Bell County, including Salado, an area that historically votes heavily Republican, and which is more Anglo than Killeen, were placed into HD54. TrJ1405 (Korbel); TrJ1745 (Aycock). Thus, areas that were largely minority voters were removed from HD54 and replaced with areas that were largely Anglo voters; the effect was to make it more difficult for minority voters in HD54 to elect their candidate of choice. TrJ1405.

684. Plaintiffs' demonstration maps propose minority coalition districts; none are 50.1% of a single minority group. TrJ1454 (Korbel).

685. LULAC has provided Plan H293 with a proposed *Gingles* demonstration district in Bell County that joins portions of Killeen and Harker

Heights with portions of Temple and Belton. LULAC-12-2C; Joint Map Ex. J-38; Tr700-01 (Korbel). Using 2005-2009 ACS, this district has 19% HCVAP, 31.2% BCVAP, and 2.8% Asian CVAP. Red-106 Report. B+HCVAP is therefore 50.2% and B+H+Asian CVAP is 53%. Anglo VAP is 39.2% and Anglo CVAP is 43.6%. Red-202 Report; Red-106 Report. This is a proposed minority coalition district. The compactness scores for the district are .310 area rubber band and .025 perimeter-to-area. Red-315 Report. The proposed district is not compact and fails to satisfy the first *Gingles* precondition.

686. MALC has provided Plan H329 as a *Gingles* demonstration map. MALC-115 (demo map). This map creates a compact district, HD54, based around the City of Killeen, while HD55 takes in the remainder of Bell County and all of Lampasas County. HD54 keeps the minority population in and around Killeen together. MALC-116 (demo map with racial shading). HD54 Anglo CVAP is 43%; (B+H+Asian CVAP is 51.6%), and HD55 Anglo CVAP is 73.2%. MALC-117(demographic data using 2008-2012 ACS for H329). These districts could plug-in to the existing map.

687. LULAC, MALC, and the Perez Plaintiffs have provided Plan H364 as a *Gingles* demonstration two-district map. TrJ1406 (Korbel); MALC-118 (demo map) (it consists of two plug-in districts to map H283, H309, or H358) . This map creates HD54, a compact district centered around Killeen. HD54 includes almost the entire city of Killeen (with the exception of finger annexations with virtually no population) and all of nearby Fort Hood that is within Bell County. TrJ1406; MALC-172. HD55 includes the remainder of

Bell County and all of Lampasas county. This map keeps the minority community in Killeen together in HD54 and joins it with Fort Hood. MALC-119 (H364 map with racial shading). The B+HVAP of HD54 is 50.5%. TrJ1408 (Korbel); Red-202 Report; MALC-172. Using 2008-2012 ACS data, the B+HCVAP is 50.4% (including Black plus White and Black plus American Indian). TrJ1408; MALC-172 (Red-116 Report). Using 2008-2012 ACS data, HD54 is 42.4% Anglo CVAP (B+H+A CVAP is 52.2%), and HD55 is 73.1% Anglo CVAP. TrJ1408; MALC-120; MALC-172/Perez-135 at 25. Compactness measures are essentially the same between H283 and H364. TrJ1409 (Korbel). District 54 is very compact and is more compact than HD54 in Plan H283, while HD55 is less compact. MALC-172.

688. LULAC, MALC, and the Perez Plaintiffs have provided Plan H369 as a *Gingles* demonstration map. MALC-121 (demo map) (three plug-in districts). This map creates HD54 around minority areas in Killeen and combines them with a portion of Coryell County in order to keep all of Fort Hood together in HD54; it also creates HD55 in the remainder of Bell County and HD59 places Lampasas County together with other rural central Texas counties. MALC-172 ; MALC-122 (demo map with racial shading). Using 2008-2012 ACS data, HD54 is 42.8% Anglo CVAP (B+H+A CVAP is 51.8%) and HD55 is 70.4% Anglo CVAP. MALC-123 (demographic data using 2008-2012 ACS).

689. Although Aycock has received support from some minority community leaders, including Miok Doranski (Asian), former mayor Raul Villaronga (Hispanic), and former mayor Tim Hancock (African American), TrJ1736-37 (Aycock), Aycock is not the minority candidate of choice. TrJ955 (Brischetto). In

the race between Aycock (R) and Brown (D), almost 9 out of 10 Anglo voters supported Aycock, while 8 out of 10 Latino voters, 9 out of 10 black voters, and 7 out of 10 Asian voters supported Brown. TrJ955. The voting showed a clear pattern of polarization between minority and non-minority voters. *Id.*[22] Other races examined showed the same pattern of polarization, with Anglo voters supporting the Republican candidate and minority voters supporting the Democratic candidate. TrJ956 (Brischetto). Dr. Brischetto testified that Blacks, Asians, and Latinos vote very cohesively in Bell County in the general elections. TrJ970.

690. Dr. Brischetto found racial bloc voting in general elections in Bell County. TrJ947, TrJ969; MALC-161. He found that Latinos had a very high cohesiveness. TrJ969. He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.* Brischetto did not analyze any primary elections in Bell County because of the lack of good predictor data of who is voting. TrJ956. Brischetto did not conduct a multivariate analysis for the primary elections in Bell County. TrJ978-79. No expert conducted a multivariate racially polarized voting analysis for Anglo, Asian, Black, and Hispanic voters in the primary elections in Bell County; TrJ1866 (Alford). Dr. Alford testified that there was no expert analysis of cohesion among Asian, Black, and Hispanic voters in primary elections in Bell County. TrJ1866, TrJ1895. Based on all the evidence, Alford

---

[22] Because of the large percentage of African-American voters in Bell County, Brischetto used the 2010 Census data that identified the racial composition of a precinct to estimate votes for each racial group. TrJ953-55 (Brischetto).

believed it was safe to assume they would not vote cohesively. TrJ1866. Alford's conclusions about cohesion do not take into account lay witness testimony about minority cohesion; his conclusion is based only on the statistical evidence. TrJ1895.

691. Phyllis Louis Jones of Killeen provided lay testimony of minority voter cohesion. TrJ1689. She has lived in Killeen and Fort Hood and has witnessed Black and Latino voters working together to elect candidates in Killeen. TrJ1695. They joined forces behind Timothy Hancock, an African American, for mayor of Killeen and behind Dr. Claudia Brown, an African American, for the Texas House. TrJ1695, TrJ1697-98. These African-American candidates were supported by Latinos. TrA1695, TrJ1697-98. There was also a multi-racial coalition in support of Jonathan Okray, an African American, for city council. TrJ1696. There was cohesion in support of Juan Rivera for city council, who was supported by African Americans. TrJ1697. Based on his observation of school board elections, Aycock did not agree that Black, Latino, and Asian voters vote as a bloc. TrJ1772 (Aycock).

692. Jones is an election judge and has witnessed voters of color being treated differently than Anglo voters in Bell County elections in recent years. TrJ1698-99 (Jones). She stated that Anglo election judges do not get interpreters for Latino voters. TrJ1699. She testified that the Fraternal Order of Police in Temple stood within 50 feet and asked voters how they were going to vote, and this was intimidating. *Id.* She further testified that, in 2014, when Anglos voted they were not asked for as much ID as Hispanic voters (if the voter was Hispanic and only

had one form of ID, they had to fill out a residency form). TrJ1702 (Jones).

693. Jones lived in benchmark HD54, represented by Jimmie Don Aycock, and she testified that he does not adequately represent voters of color in Killeen. TrJ1703. Specifically, she did not feel he represented them with regard to education and testing. Tr1703-04. Aycock voted for the voter ID law even though minority groups and legislators opposed it. TrJ1751 (Aycock). He also voted for massive education cuts in 2011, and for drug testing for individuals to get unemployment even though these were opposed by the NAACP. TrJ1751. Latinos, African Americans, and Asians supported Brown, an African American, against Aycock. TrJ1705 (Jones). When Brown ran against Aycock, she won most of the minority precincts in Killeen. TrJ1755 (Aycock). Aycock does not prevail in heavily African-American precincts. TrJ1717 (Jones). Jones testified that Bell County needs more minority representation. TrJ1708-09.

694. Jones supports the configuration of HD54 in Plan H202 because it keeps Killeen and Harker Heights together. TrJ1708 (Jones). It also puts Killeen with the portion of Fort Hood that is in Bell County, and she felt that Killeen and Fort Hood should be together in a district. TrJ1706 (Jones). However, a southern portion of Killeen is split into HD55. In Plan H283, Fort Hood is split and is separated from the northern part of Killeen, which considers itself "one" with Fort Hood. TrJ1709-10 (Jones).

695. In Bell and Lampasas Counties, 13% of Hispanic and 12.1% of African-American households received SNAP or food stamps, compared to only 5% for Anglos. MALC-152. Hispanic and African-

American families were twice as likely to be below the poverty level than Anglo families. *Id.*

696. In Bell and Lampasas Counties, 15% of Hispanics over the age of 25 are functionally illiterate, compared to 2.4% of Anglos. MALC-153. 25.5% of Hispanics over the age of 23 have not graduated high school, compared to 8.8% for Anglos. *Id.* Hispanic and African-American students lag behind Anglo students in SAT scores, college readiness, TAKS commended performance, and advanced placement. *Id.*

697. Anglo Republican incumbent Aycock divided the growing minority City of Killeen to protect his incumbency.

698. Plaintiffs' proposed § 2 districts are proposed minority coalition districts. There is expert testimony and lay testimony of cohesion in the general elections.

West Texas Midland/Ector Counties

699. In Plan H100, HD81 consisted of Andrews, Winkler, and Ector Counties. HD81 was 52.4% Hispanic in terms of total population and 47.1% HVAP. HD81 was 41.8% Anglo in terms of total population and 47.2% Anglo VAP. HD82 consisted of Dawson, Martin, Midland, Crane, and Upton Counties. HD82 was majority-Anglo in terms of total population and Anglo VAP. Red-202 Report.

700. Benchmark HD81 was 8,611 (-5.1%) below ideal population and HD82 was 4,403 (-2.6%) below ideal population. Red-202 Report.

701. In Plan H283, HD82 stays the same, but Ward County is added to HD81. TrJ1393 (Korbel). Using 2008-2012 ACS data, HD81 has 52.8% Anglo CVAP and HD82 has 60.1% Anglo CVAP. MALC-90;

D-109 at 54. Neither district is a Latino opportunity district.

702. The minority population of the nine counties that make up the Midland-Ector mix grew by 46,067, while Anglo population shrank by 8,498. TrJ1392-93 (Korbel); MALC-142. According to 2010 Census data, minorities make up more than 53% of the population of the nine-county area included in HD81 and HD82 in Plan H283. MALC-142. There is a substantial, fast-growing Hispanic population in the Midland-Ector County area. TrJ1393-94 (Korbel). Midland and Odessa have been electing Hispanic county commissioners for some time now. TrJ1394. Despite the minority growth, the Legislature did not create any opportunity districts in the Midland-Ector area. TrJ1393.

703. Plan H111 and Plan H205, two Martinez Fischer statewide proposals submitted during the session, create HD81 in West Texas that joins Hudspeth County next to El Paso County, with Culberson, Reeves, Loving, Ward, Crane, and parts of Winkler, Ector, and Midland Counties. Proposed HD81 is 51.2% HCVAP. This district splits numerous cities, including Kermit in Winkler County, Odessa in Ector County, and Midland in Midland County. It violates the County Line Rule. HD81 has an area-rubber-band score of .741 and a perimeter-to-area score of .235. Red-315 Report. Rep. V. Gonzales testified that proposed HD81 was no more strange looking than HD74, a large west-Texas district, in the enacted map. V. Gonzales depo. at 65. HD74 in Plan H283 has an area-rubber-band score of .692 and a perimeter-to-area score of .189. MALC-138 (Red-315 Report). Defendants' expert Giberson concluded, based

on compactness scores and visual observation, that the district is not compellingly compact such that it would be required to be drawn. Joint Expert Ex. E-18 (Giberson report) at 8; Giberson depo. (Joint Ex. J-42) at 12-13. In his deposition, he acknowledged that the compactness scores for HD81 were not remarkable. Giberson depo. (Joint Ex. J-42) at 87. He noted that the scores for this district benefitted from the inclusion of whole counties on the west side, which help offset the non-compactness on the eastern side. Joint Expert Ex. E-18 at 8; Giberson depo. (Joint Ex. J-42) at 87-88.

704. MALDEF advocated for a new Latino opportunity district in West Texas during the session. Plan H115 creates HD81, a long, odd-shaped district that spans along I-20 from Reeves County to Howard County, including parts of five counties and three whole counties, and breaking the County Line Rule numerous times. It splits the cities of Kermit in Winkler County, Odessa in Ector County, and Midland in Midland County. Proposed HD81 is 59.5% HCVAP using 2005-2009 ACS data. Red-109 Report. HD81 has an area-rubber-band score of .479 and a perimeter-to-area score of .128. Red-315 Report.

705. At the April 15 HRC hearing, Luis Figueroa testified against Plan H113 and offered H115. He asserted that the new CVAP-majority district in West Texas (HD81) united the Latino community of interest. D-595 at 62-63. In response to questioning about the County Line Rule, Figueroa admitted that the map broke the rule to create § 2 districts, but asserted that this was necessary to comply with the VRA, and that the County Line Rule was being applied in a discriminatory manner to prevent the creation of § 2 districts. *Id.* at 12-15, 93. (Plan H115 also has

numerous county cuts related to one-person, one-vote that were not necessary for VRA compliance and Figueroa said they could be re-evaluated. D-595 at 96.) Figueroa asserted that proposed HD81 was compact given the lower populations in the area and did not split any precincts. *Id.* at 108-16. He asserted that the district represented "communities within different counties that are contiguous, that they are in a compact geographical region, and the Latinos in the area are over 50 percent of the required population size, and that they — but not for these county line rules would be able to elect a candidate of choice." *Id.* at 106. He further stated, "And so it encompasses metropolitan areas in Ector and includes parts of Winkler. But you can see that it doesn't extend all the way out in one single stream, nor does it extend into — you've got to remember this area of the population is very under — very small population so it's going to be larger than most districts because of the lack of population. So for that area, it is — it is a compact district." *Id.* at 107. Rep. Phillips (Anglo, Republican) argued that it was not compact and did not respect communities of interest like cities and commissioner precincts, and that it was a racial gerrymander. Figueroa stated that they were willing to do further study to encompass more communities of interest. *Id.* at 111. Plan H115 was not adopted.

706. At the April 27 floor debate, Rep. Alonzo (Hispanic, Democrat) laid out Amendment No. 26 (Plan H164), "the MALDEF amendment." D-190 at 139. This plan included the same proposed HD81 as in Plan H115. He noted that West Texas lost population and had lost two districts, but there was an increase in Hispanic population, so they should create new

opportunity districts. D-13 at S208. There was discussion that the plan paired members in Dallas, and Alonzo stated that the main purpose of the proposal was to talk about the opportunities, and that he would withdraw it. *Id.* at S209.

707. Rep. Martinez Fischer laid out Amendment No. 27 (H195) and Amendment 30 (Plan H197) as MALC statewide plans. D-13 at S210; D-190 at 190-244. These maps created the same proposed HD81 as in Plan H111 and Plan H205. Martinez Fischer and Rep. Gallego discussed the lack of Latino districts in West Texas, Odessa, Amarillo, Lubbock, Midland, and the Panhandle. D-13 at S211. Martinez Fischer stated that Latinos represent 40% of the West Texas population and their numbers had maintained growth, while Anglo population had declined, yet no growth was reflected in the proposed plan. *Id.* Gallego and Rep. Alonzo discussed that the MALC plan was trying to address the increase in Hispanic population in West Texas, even though the overall population decline caused a loss of two seats in West Texas. *Id.* at S218-19. Martinez Fischer stated that the map demonstrated that if you want to create minority opportunity districts, you certainly can, but that it was not done. *Id.* at S212. Solomons stated that Martinez Fischer's amendments unnecessarily violated the County Line Rule and they were tabled.

708. County Commissioner Luis Sanchez testified that the majority of Latinos that live in Midland come from a small town in Mexico called Ojinaga. TrJ445. They still read the paper from Mexico. *Id.* There is a similar connection to the Mexican-American population in Odessa. TrJ446 (Sanchez). They are U.S. citizens and residents with a common connection to a

small town in Mexico. *Id.* He testified that there is a natural connection between the Latino communities in Odessa and Midland. They all work in the same type of oilfield business, the majority of their families are from that same small town in Mexico, and they have the same media and church diocese. He testified that H283 splits up the Latino vote because the majority of Latinos are concentrated in certain areas in Midland and certain areas of Ector County, and they would be more effective together. TrJ457-58. Sanchez testified that Plan H283 does not give an equal opportunity for Latino voters to elect their candidate of choice because they do not have enough concentrated minority population. TrJ459-60.

709. MALC and the Perez Plaintiffs submitted plans Plan H295, Plan H296, and Plan H297 as interim House plans that also create a new HD81. Proposed HD81 includes all of Ward, Crane, Upton, Reagan, Irion, Crockett, and parts of Tom Green, Midland, and Ector Counties. It is 61.4% HVAP and 50.1% total SSVR (51% non-suspense SSVR). MALC interim plan hearing ex. 9. This district violates the County Line Rule.

710. MALC has submitted *Gingles* demonstration plan H329. MALC-94 (map). In this map, HD81 takes in part of Midland and Ector Counties and large portions of West Texas. HD82 takes in the remainder of Midland and Ector Counties. Minority areas of Midland and Odessa and Midland and Ector Counties are joined with West Texas counties that have mixed population. MALC-95 (H329 HD81 overlay with shading by VTD). This is not a plug-in map. Using 2008 to 2012 ACS data, HD81 is 55.3% HCVAP. MALC-96. HD81 has an area-rubber-band score of

.743 and a perimeter-to-area score of .238. *Id.* Sanchez testified that this plan would give the Latino community a better opportunity to elect a candidate of their choice than Plan H283. TrJ463-64. Sanchez testified that the areas encompassed are similar, and although the Latino-preferred candidate lost in an election analysis of a similar district, he thinks someone local, who knows people, could win. TrJ464.

711. MALC submitted demonstration Plan H360 as a plug-in plan to Plan H283. MALC-91 (map). HD81 in this plan includes Ward, Crane, Upton, and minority parts of Ector and Midland Counties. Proposed HD81 is 50.1% HCVAP using 2008-2012 ACS data. TrJ461 (Sanchez); MALC-93. HD82 takes the remainder of Ector County and Midland County and pairs them with Dawson County, Martin County, Andrews County, and Winkler County. These districts can be plugged-in to Plan H283. This plan breaks the County Line Rule.

712. Plaintiffs' expert Korbel testified that the Midland-Odessa minority community is a naturally occurring district, as shown in Plan H360, a two-district plug-in plan. TrJ1397. The minority populations of Midland and Odessa are only about 12 to 15 miles apart. TrJ1396 (Korbel). But they are separated into two districts in Plan H283 (as they were in the benchmark plan H100). Plan H360 has no VTD splits. TrJ1398 (Korbel). The district deviations are similar to those in H283. HD81 in H283 is 46.9% Hispanic VAP, and in Plan H360 it is increased to 56.3%. TrJ1399 (Korbel). B+HVAP is increased from 50.7% to 63%. *Id.* HCVAP is increased from 41.4% to 50.1% in HD81. TrJ1400. B+HCVAP increases from 45.5% to approximately 58% (57.5%). TrJ1400

(Korbel). It does not pair the incumbents. TrJ1401 (Korbel). The districts are within the range of deviation for compactness and there is very little difference from H283 in terms of compactness. *Id.* Korbel agreed that this map likely captures every 50% plus Hispanic VTD into HD81. TrJ1456. Sanchez testified that Plan H360 would give the Latino community more of an opportunity to elect a minority candidate of choice. TrJ460.

713. Sanchez testified that he won his 2008 primary against an African American because he had African-American support. He testified that he did well in his 2012 general election with Latino voters and African-American voters. TrJ450. He also testified that Anglo voters in Midland County generally do not support candidates that are also supported by the Latino community. TrJ455. Latinos have not been successful in county-wide races in Midland. TrJ453 (Sanchez). The mayor of Midland is Latino. TrJ454 (Sanchez). Sanchez did not know of any Latino officeholders elected in and around Midland County from areas that were majority Anglo. *Id.* Sanchez does believe that Midland Latino citizens have an equal opportunity to participate in the political process. TrJ468. Korbel agrees that minority voters can and do participate in Midland and Ector County school board, city council, and county commissioner elections. TrJ1458.

714. Plaintiffs offered the deposition and Declaration of Rep. Pete Gallego. Rep. Gallego served eleven terms in the House and represented HD74 in West Texas. He is familiar with the location and distribution of Latino communities in West Texas from campaigning and redistricting over four cycles. Docket

no. 331 at 2. Many of the Latino communities in West Texas represent a community of interest consisting of individuals and families in certain low-income categories and at certain poverty levels. These communities are characterized by high poverty levels, low income, and significant health issues. *Id.* The Latino community in West Texas has experienced substantial population growth. Instead of creating two new Latino districts, Plan H283 diluted Latino voting strength and HD81 and HD84 are 35.8% HCVAP and 24.9% HCVAP, respectively. *Id.* at 3. In contrast, MALC's plan H205 provides Latino opportunity by including HD81 (in Midland/Ector Counties) and HD84 (in the Panhandle) with 51.8% and 53.9% HCVAP. *Id.* The two districts seek to combine communities that share a similar poverty level, low-income characteristics, and healthrelated concerns. These communities have been in place many decades and represent a politically cohesive community with similar interests that are expressed in local, state, and national elections. HD81 includes significant portions of the Latino community residing in the southern parts of Ector and Midland Counties, and other counties such as Reeves, Culberson, and Hudspeth Counties, which also contain substantial Latino communities. *Id.* at 4.

715. In Midland County, the mean household income for Anglos is more than twice that of Hispanics and African Americans. MALC-140. Per capita income for Anglos is almost three times that of Hispanics. *Id.* Hispanics and African Americans are four to five times more likely to rely on food stamps than Anglos. *Id.* Sanchez testified that the Latino community is lower to middle class. TrJ465. More than 22% of Hispanics

over the age of 25 are functionally illiterate, compared to 1.9% of Anglos. MALC-141. 42.9% of Hispanics and 21.4% of African Americans over the age of 25 are not high school graduates, compared to 7.4% of Anglos. *Id.* 8.3% of Anglos over the age of 25 have professional degrees, compared to 1.1% of Hispanics and 5% of African Americans. *Id.* Sanchez testified that Hispanics are not doing as well as Anglo counterparts in terms of educational attainment. TrJ465.

716. In Ector County, the Anglo per capita income is almost twice that of Hispanics and African Americans. MALC-143. The median income of Hispanic families is approximately two-thirds of that of Anglos. African-American median family income is less than half that of Anglos. *Id.* More than one quarter of Hispanics over the age of 25 are functionally illiterate compared to 3.5% of Anglos. MALC-144. Anglos make up 71.2% of those with professional or post-graduate degrees even though minorities make up more than 50% of the population. Almost 44% of Hispanics over the age of 25 are not high school graduates, compared to 13.8% of Anglos.

717. Dr. Brischetto found racially polarized voting in general elections in Midland and Ector Counties. TrJ947, TrJ969. He found that Latinos had a high level of cohesiveness. TrJ969. He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.* Brischetto noted that, according to 2010 Census data, Ector county was 47.3% Latino VAP and 46.4% Anglo VAP. MALC-161 Table 8. Dr. Brischetto found racially polarized voting in Ector County in the general election, and the Republican and Democratic primaries. TrJ947-51. Midland County was 32.9% Latino VAP and 58%

Anglo VAP. MALC-161 (Brischetto report) Table 11. Latino voter participation was very low. MALC-161 ¶ 60. In each of the three races involving minority candidates, voting between Latinos and non-Latinos was extremely polarized. MALC-161 ¶ 61. Brischetto was unable to draw a conclusion for the Republican primary due to a lack of good data. MALC-161 ¶ 62-63. Brischetto also did not look at the Democratic primary because there were no races with Latino versus non-Latino candidates. MALC-161 ¶ 63.

718. Plaintiffs presented maps with majority-HCVAP districts during the session (H111/H205 and H115/H164) that were rejected. These required breaking the County Line Rule.

719. Plaintiffs present demonstration maps with majority-HCVAP districts using 2008-2012 ACS data (H329/H360); one is more compact and is a plug-in plan (H360). These require breaking the County Line Rule.

720. Dr. Brischetto found racially polarized voting in general elections and Democratic primaries in Midland and Ector Counties.

West Texas Lubbock/Panhandle

721. In Plan H100, HD84 was centered around the City of Lubbock in Lubbock County, and HD83 included the rest of Lubbock County and joined it with Hockley, Cochran, Yoakum, and Gaines Counties. Both were Anglo-majority districts in terms of VAP, though HD84 was only 47.7% Anglo in terms of total population. D-100; Red-202 Report.

722. In Plan H113, the first public plan, HD84 remained centered around Lubbock and wholly within

Lubbock County. HD83 joined the remainder of Lubbock County with Hockley County to the west and Hale County to the north.

723. Plan H115 was introduced by MALDEF during the session. At the April 15 HRC hearing, Luis Figueroa testified against Plan H113 and offered H115 with proposed Latino opportunity district HD87 in the Panhandle, in and around Lubbock County. HD84 remains wholly within Lubbock County. HD83 (an Anglo district) takes in part of Lubbock County and connects to eleven other counties (six whole counties and five parts of counties). HD87 is a long, odd-shaped district that includes two whole counties (Floyd and Crosby) and parts of nine other counties, including Lubbock County. HD87 is 51.6% HCVAP using 2005-2009 ACS data and 46.8% total SSVR/48.9% nonsuspense SSVR. It has an area-rubber-band score of .395 and a perimeter-to-area score of .062. Defendants' expert Giberson concluded, based on compactness scores and visual observation, that the district is not compellingly compact such that it would be required to be drawn. Joint Expert Ex. E-18 (Giberson Report) at 8; Giberson depo. (Joint Ex. J-42) at 12-13.

724. There was quite a bit of discussion about the proposed district at the hearing. Figueroa noted that there were "huge Latino growths" in the Panhandle region that were not reflected in the proposed map, and that they were a community of interest so that the district could be drawn in compliance with § 2. D-595 at 62. Rep. Hilderbran (Anglo, Republican) noted that HD87 did not look compact, did not look like it cared about communities of interest, and "basically zigzag[ged] around to catch precincts in those rural

counties that have the most Hispanics in them." *Id.* at 73. Figueroa disputed the assertion, stating, "We drew a Latino majority district in an area that we felt was compact enough to where a district could be drawn. And so we attempted to see if Latinos were being split because of the county line rule and we thought the Latino communities were being split because of the county line rule fracturing their ability to elect their candidate of choice." *Id.* at 74. Figueroa said the district was drawn with a goal of 50% HCVAP to ensure Latino voter opportunity. *Id.* at 75-76. Rep. Hilderbran asserted that the Latino communities in the different counties might have different interests, and that he thought more compact districts could be drawn that respect communities of interest but still provide Latino opportunity. *Id.* at 77-79. Figueroa pointed out that other districts in Solomons' proposed map were not particularly compact and thus "communities of interest and the prettiness of compactness is sometimes in the eye of the beholder." *Id.* at 87. Figueroa said that HD87 was compact given the lower populations in the area and did not split any precincts. *Id.* at 108-16. He asserted that the district represented "communities within different counties that are contiguous, that they are in a compact geographical region, and the Latinos in the area are over 50 percent of the required population size, and that they -- but not for these county line rules would be able to elect a candidate of choice." *Id.* at 106. Figueroa noted that HD87 did not split any precincts and although it included parts of several counties, "these populations in these counties are very small so it is going to extend a little bit longer than, of course, an urban district, but it is still very much within the traditional size of a house district in those areas." *Id.*

at 112. Figueroa noted that the communities of interest they were trying to unite "came from working with the community, reaching out to them, looking at socioeconomic data, looking at some of the industries." *Id.* at 114. Figueroa and Rep. Phillips (Anglo, Republican) discussed whether the district was required by § 2 or whether it was a racial gerrymander, and Phillips asked how HD87 showed respect for political subdivisions. *Id.* at 110-16. Figueroa responded, "In District 87 we maintain all the VTDs. We drew as many counties as we could whole to respect the communities of interest. We drew it in a way so that Latinos who are unified under a community of interest would be able to elect a candidate of choice." *Id.* at 116. However, Figueroa acknowledged that only two of ten counties were wholly within HD87. *Id.* at 117. In response to questioning about the County Line Rule, Figueroa admitted that the map broke the rule to create § 2 districts, but asserted that this was necessary to comply with the VRA. *Id.* at 12-15, 63-64, 94-95. Figueroa said that the other county cuts elsewhere in the map (other than to create Latino opportunity districts) were made to comply with one person, one vote, and they would be happy to re-evaluate those. *Id.* at 96.

725. Plan H111 and Plan H205, two Martinez Fischer statewide proposals presented during the session, create HD84 in the Panhandle, taking in all of Crosby County, and parts of Dawson, Lynn, Terry, Lubbock, Floyd, Hale, Lamb, Swisher, Castro, Deaf Smith, Randall, and Potter Counties. It breaks the County Line Rule. Proposed HD84 has a 53.3% HCVAP using 2005-2009 ACS data. It has an area-rubber-band score of .342 and a perimeter-to-area

score of .042. Defendants' expert Giberson concluded based on compactness scores and visual observation (which included observing that many county lines were split) that this district was not compellingly compact and was likely not required by the VRA. Joint Expert Ex. E-18 (Giberson Report) at 8-9; Giberson depo. (Joint Ex. J-42) at 86-87.

726. On second reading on April 27, Rep. Smithee (Anglo, Republican) offered Amendment No. 20 (Plan H154) concerning West Texas. D-13 at S203. This amendment would avoid the pairing of Landtroop and Perry and eliminate part of "that district that has drawn so much attention, that linear district that goes pretty much to the width of Texas, over 350 miles" (HD88 in Solomons' plan, which was a long narrow district in Plan H153 that stretched from north of DFW to almost the New Mexico border). *Id.* He also stated it would preserve communities of interest and make the districts more geographically compact. *Id.* at S204. Rep. Perry (Anglo, Republican) offered Amendment No. 21 (H206) to Amendment No. 20 to "clean up some inter-district stuff." He stated that it would affect HD84 in Lubbock County by removing a "little finger" that was created before and was politically motivated but no longer needed. *Id.* at S206. Rep. Frullo (Anglo, Republican) opposed it. *Id.* at S204. Rep. Martinez Fischer advised that members of MALDEF should "sit this one out" because they should not vote for maps that they may not ultimately agree on in the bigger picture. *Id.* at S205. Amendment No. 21 was tabled. Rep. Gallego offered Amendment No. 22 (H250) to Amendment No. 20 to add Loving County to HD74, and it was acceptable to the author and adopted. *Id.* at S206. Amendment No. 20, as amended,

was adopted. *Id.* After the amendment, HD84 remained the same, but HD83 now joined the rest of Lubbock County with Lynn County to the south, Terry County and Gaines County to the southwest, and Borden, Scurry, and Mitchell Counties to the southeast. It also made significant changes to HD68, HD88, and other districts in the Panhandle and West Texas.

727. Rep. Alonzo (Hispanic, Democrat) laid out Amendment No. 26 (Plan H164), "the MALDEF amendment." D-190 at 139. The proposed HD87 in this plan is the same as in Plan H115. Alonzo said it would add opportunity districts, including in Lubbock. D-13 at S208. After a debate about the County Line Rule, the amendment was withdrawn. *Id.* at S209. Alonzo stated that he did not intend for it to have a legal effect. *Id.* at S210.

728. In Plan H283, HD84 is centered in the City of Lubbock, while HD83 takes in the remainder of Lubbock County and joins it with Lynn, Borden, Scurry, Mitchell, Terry, and Gaines Counties. Using 2008-2012 ACS data, HD83 is 67.6% Anglo CVAP and HD84 is 59.3% Anglo CVAP. MALC-99; D-109.

729. County Commissioner Lorenzo "Bubba" Sedeno lives in Lubbock County. He testified that H283 splits the Latino voters off and divides up the minority community. TrJ482. He testified that Plan H283 does not provide Latinos with an opportunity to elect candidates of their choice.

730. MALC submits *Gingles* demonstration Plan H329. MALC-100 (map). In this map, HD84 is wholly within Lubbock County and the remainder of Lubbock County is joined with two other districts, HD83 and

HD88. According to 2008-21012 ACS data, proposed HD88 has a 50.9% HCVAP. MALC-102; TrJ495 (Sedeno). Using 2005-2009 ACS data, the HCVAP for HD88 is 47.2%. TrJ496 (Sedeno). HD88's SSVR is 46.3%. TrJ497 (Sedeno). Three districts (HD83, HD84, HD85) come into Lubbock County, but that is the only split. TrJ485, TrJ493 (Sedeno). The City of Lubbock is also divided among three districts. HD88 includes parts of the City of Lubbock and Lubbock County and joins them with 10 surrounding counties. HD84 takes a portion of Lubbock County. And HD83 takes another portion of Lubbock County and joins it with Lamb, Hockley, and Terry Counties. HD88 has a .623 area-to-rubber band score (compared to less-compact HD83 of .576 in Plan H283) and a .162 perimeter-to-area compactness score. MALC-99; MALC-102. Sedeno testified that this map would help Latinos "tremendously" because it includes more Hispanic population and "would give us a fighting chance." TrJ483-84. This map creates a district that unites counties with significant Hispanic population. TrJ479 (Sedeno). Based on his political experience in the area, Sedeno testified that proposed HD88 would give Latinos an opportunity to elect a candidate of their choice. TrJ485.

731. Past Texas House maps have split excess county population between two districts. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (1972 map, Brazoria County and Smith County); S.B. 590, 63rd Leg. R.S. (1974 map, Brazoria County and Smith County); H.B. 1097, 64th Leg. R.S. (1976-1980, Brazoria County and Smith County); H.B. 1389, 68th Leg. R.S. (1982-1984 Brazoria County, Jefferson County, Collin County); H.B. 753, 69th Leg. R.S.

(1986-1990 Brazoria County, Jefferson County, Collin County). MALC Oct. 31, 2011 interim hearing exhibits 29-34.

732. Although Precinct 3, which is 52% Hispanic, has elected Sedeno, no other county commissioners are Hispanic. TrJ472 (Sedeno). There are Latino elected officials in city council and school district positions in the Lubbock area. TrJ488-89 (Sedeno).

733. In Lubbock during the Obama 2012 election, Obama signs were stolen, then cut up and the "N" word written on them. TrJ486 (Sedeno).

734. Schools and public facilities in Lubbock were segregated. TrJ487 (Sedeno). The Latino community has a lower standing in education and income than their Anglo counterparts in Lubbock. *Id.*

735. Sedeno was not aware of any racial voting discrimination. TrJ490 (Sedeno). He also could not think of any specific examples of discrimination against Hispanics in employment or health. TrJ490-91.

736. Plaintiffs offer the declaration and deposition of Rep. Pete Gallego. Rep. Gallego served eleven terms in the House and represented HD74 in West Texas. He is familiar with the location and distribution of Latino communities in West Texas from campaigning and redistricting over four cycles. Docket no. 331 at 2. Many of the Latino communities in West Texas represent a community of interest consisting of individuals and families in certain low income categories and at certain poverty levels. These communities are characterized by high poverty levels, low income, and significant health issues. *Id.* The Latino community in West Texas has experienced

substantial population growth. Instead of creating two new Latino districts, Plan H283 diluted Latino voting strength and HD81 and HD84 are 35.8% HCVAP and 24.9% HCVAP, respectively. *Id.* at 3. In contrast, MALC's plan H205 provides Latino opportunity by including HD81 (in Midland/Ector Counties) and HD84 (in the Panhandle) with 51.8% and 53.9% HCVAP. *Id.* The two districts seek to combine communities that share a similar poverty level, low-income characteristics, and healthrelated concerns. These communities have been in place many decades and represent a politically cohesive community with similar interests that are expressed in local, state, and national elections. Although HD84 may appear odd-shaped, the contours are no more odd than districts in other parts of H283, such as HD41. HD84 is odd-shaped to include communities in rural areas and is the best shape to accommodate a community of interest of similarly situated voters united by common industries and shared cultural experiences. *Id.* at 4.

737. In Lubbock County, the mean family income for Anglos is twice that of African Americans and Hispanics. MALC-146. The per capita income for Anglos is more than twice that of African Americans and Hispanics. *Id.*; Joint Expert Ex. E-1 (Chapa Report) Table 5. Hispanics and African Americans are several times more likely to rely on food stamps than Anglos. MALC-146.

738. In Lubbock County, almost 20% of Hispanics over age 25 are functionally illiterate, compared to 3.2% of Anglos. MALC-147. 35.3% of Hispanics and 21.7% of African Americans over the age of 25 are not high school graduates, compared to 8.5% of Anglos. *Id.*; *see also* Joint Expert Ex. E-1 (Chapa Report) Table 4

(noting that 40.6% of Hispanics have less than a high school education). 18.5% of Anglos over 25 have graduate or professional degrees, compared to 2.5% of Hispanics and 3.8% of Blacks. MALC-147. Anglos in Lubbock ISD are more likely to have TAKS commended performance, have SAT scores at or above criterion, take advanced placement or IB courses, and be college ready. *Id.* Anglos have higher average SAT scores than Hispanics and African Americans. *Id.*

739. Dr. Brischetto found racial bloc voting in general elections in Lubbock County. TrJ947 TrJ969; MALC-161. He also found racial bloc voting in the Republican primary. MALC-161. He found that Latinos had a very high cohesiveness. TrJ969. He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.* Attorney Jackson said at trial that the State does not contest the existence of racially polarized voting in Lubbock County. TrJ975.

740. Plans (H115, H111/H205) were proposed during the session that would create a new HCVAP-majority (but not SSVR-majority) district in the Panhandle. Although other significant changes were made to the map at the request of an Anglo Republican member, the proposed Latino districts were rejected because they did not look compact and would require a violation of the County Line Rule.

741. MALC's *Gingles* demonstration map H329 creates HD88, an HCVAP-majority district using 2008-2010 ACS data but it would not have been HCVAP-majority using 2005-2009 ACS data.

SIGNED on this 20th day of April, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

/s/
ORLANDO L. GARCIA
CHIEF UNITED STATES
DISTRICT JUDGE

No. 17-626

In The
Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,

Appellants,

v.

SHANNON PEREZ, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS OR AFFIRM AS TO HOUSE DISTRICT 90

NINA PERALES
Counsel of Record
ERNEST I. HERRERA
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, #300
San Antonio, TX 78205
Tel: (210) 224-5476
nperales@maldef.org

Counsel for Appellees Texas Latino Redistricting Task Force, et al.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the State's admitted predominant use of race in altering the boundaries of HD90 in 2013 can survive strict scrutiny when officials neither invoked the VRA nor conducted an inquiry into the requirements of the VRA when they redrew the district.

LIST OF PARTIES FILING THIS MOTION

Texas Latino Redistricting Task Force, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Joe Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz and Rebecca Ortiz

CORPORATE DISCLOSURE STATEMENT

TEXAS LATINO REDISTRICTING TASK FORCE (unincorporated)

Pursuant to Supreme Court Rule 29.6, the Texas Latino Redistricting Task Force is an unincorporated association. The Texas Latino Redistricting Task Force has no parent corporations, and no stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES FILING THIS MOTION	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
MOTION TO DISMISS OR AFFIRM WITH RESPECT TO TEXAS HOUSE DISTRICT 90	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE MOTION	11
I. If the Court concludes it has jurisdiction, it should affirm the district court's decision that HD90 is unconstitutionally racially gerrymandered	11
A. This Court should affirm the district court's holding that race predominated in redrawing HD90	13
B. Texas lacked a compelling state interest in redrawing HD90	15
C. This Court should affirm the district court's holding that HD90's boundaries were not narrowly tailored to serve a compelling interest	19

TABLE OF CONTENTS – Continued

Page

II. The Court should dismiss this appeal for lack of jurisdiction 25

CONCLUSION 26

APPENDIX

Excerpts of Trial Transcript, July 10, 2017 ..... App. 1

Excerpts of Trial Transcript, July 11, 2017 ..... App. 11

TABLE OF AUTHORITIES

Page

CASES

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 13, 15, 18, 19

Anderson v. Bessemer City, 470 U.S. 564 (1985) 12

Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017) .....*passim*

Cooper v. Harris, 137 S. Ct. 1455 (2017) .....*passim*

Miller v. Johnson, 515 U.S. 900 (1995) 13, 14

Perez v. Abbott, No. SA-11-CV-360, 2017 WL 1406379 (W.D. Tex. Apr. 20, 2017) 1

STATUTES

2013 Tex. Sess. Law Serv. 1st Called Sess. ch. 2 (S.B. 3) 2

28 U.S.C. § 1253 1

52 U.S.C. § 10301, *et seq.* .....*passim*

MOTION TO DISMISS OR AFFIRM WITH RESPECT TO TEXAS HOUSE DISTRICT 90

Appellees in the above-captioned case respectfully move that the Court dismiss the appeal for lack of jurisdiction under 28 U.S.C. § 1253 or, alternatively, that the Court affirm the district court's order with respect to Texas House District (HD) 90.

OPINIONS BELOW

The appendix to the Jurisdictional Statement contains the district court's opinion on Plan H283. The appendix to the Motion to Dismiss or Affirm of appellees Perez, et al. contains the district court's opinion issuing findings of fact on Plan H283: *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 1406379 (W.D. Tex. Apr. 20, 2017).

JURISDICTION

The Jurisdictional Statement invokes this Court's jurisdiction under 28 U.S.C. § 1253. At present, this Court lacks jurisdiction over claims regarding Plan H358. *See* infra p. 25.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to the Jurisdictional Statement omits the statute appellees challenged. It is 2013 Tex.

Sess. Law Serv. 1st Called Sess. ch. 2 (S.B. 3), available at http://tinyurl.com/TXPlan358.

STATEMENT OF THE CASE

This appeal regarding HD90 involves a single state House district that Texas redrew in 2013 and that the district court unanimously concluded was an unconstitutional racial gerrymander. J.S. 77a, 82a.[1]

Unlike the other House districts that are the subject of the State's appeal, HD90 was enacted by Texas in 2013 as part of a "handful of districts" that Texas altered after conducting elections under the court-ordered 2012 interim House redistricting plan. J.S. 2. HD90 is not part of the State's argument that it cannot be held liable for discrimination in districts that it enacted in 2011 and that were carried forward into the court-ordered 2012 interim House plan.

1. Texas Representative Lon Burnam, the longtime incumbent of HD90, authored the redrawn HD90 in 2013. Having recently, and very narrowly, defeated a Latino opponent in the Democratic primary, Rep. Burnam, who is Anglo, sought to bring into HD90 non-Latino areas that had high voter turnout rates and "had consistently and overwhelmingly supported him" in the past. J.S. 83a. At the same time, he strove to ensure that HD90 had a nominal majority of Latino

[1] The State's appeal regarding HD90 is presented in its Jurisdictional Statement Question 4 and at J.S. 33-36.

voters – 50.1% Spanish surnamed voter registration (SSVR). J.S. 73a. In meeting these goals, Rep. Burnam made unabashed use of race.

- Rep. Burnam testified that when he redrew HD90 in 2013, one of his goals was to "g[e]t rid of every white voter near the western boundary of the district[.]" Task Force M.D.A. 2a.
- Rep. Burnam testified that he split the City of Sansom Park to remove blocks from HD90 with "white majority voting age population." Task Force M.D.A. 5a.
- Rep. Burnam testified that he split voting precincts to remove specific blocks from HD90 "because they're white." Task Force M.D.A. 5a-6a.
- Rep. Burnam testified that in an earlier draft of HD90 he had included a precinct that "wasn't a good match" because "there were too many white people in that district [sic]." Task Force M.D.A. 3a.
- Rep. Burnam testified that as he directed his Chief of Staff to operate the computer redistricting system to redraw HD90, "I would point out right here between this street and that street is, you know, a hundred white voters," and order the removal of those blocks from HD90. Task Force M.D.A. 4a-5a.
- Rep. Burnam testified that population equality under the one person one vote

principle "was kind of lost in the process" because "we had to deal with taking as many white voters out as we could[.]" Task Force M.D.A. 4a.

- Rep. Burnam testified that he tracked the western boundary of HD90 and looked for white people to move from HD90 into the neighboring district HD99. Task Force M.D.A. 4a.
- Rep. Burnam testified that he also split voting precincts for the sole purpose of including Latino-majority blocks in HD90. Task Force M.D.A. 5a-9a.
- Rep. Burnam's Chief of Staff, Conor Kenny, testified that he told Rep. Burnam that splitting precinct 4125 in order to draw more Latinos into HD90 would be "ugly." Task Force M.D.A. 13a. Rep. Burnam did not express concern with the "ugly" cut and instead said that the cut was "great" because it brought more Latinos into HD90. Task Force M.D.A. 12a-13a.
- Rep. Burnam testified that Mr. Kenny did not track election results while making changes to HD90 because "[i]t was purely a demographic exercise." Task Force M.D.A. 5a.
- Mr. Kenny referred to his goal of adding blocks with greater than 50% Hispanic voting age population (HVAP) and removing blocks with less than 50% HVAP as

an "operational mandate" for the redistricting of HD90. 2017 Trial Tr. 671:9-17.

- On the floor of the Texas House of Representatives, Rep. Burnam introduced his amendment as follows: "[B]asically what it does is take the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district." J.S. 75a.

2. When Texas undertook to reconfigure HD90 in 2013, the district did not contain a population outside the acceptable deviation. HD90 was a Latino-majority district and did not require revision to provide electoral opportunity to Latinos. The district court had issued no ruling on any legal challenge to HD90. Nevertheless, Texas substantially altered the boundaries of HD90, shifting thousands of individuals into and out of the district. J.S. 36; J.S. 80a (observing that the changes to HD90 shifted approximately 8.4% of the ideal district population).

3. In 2011, Texas redistricted HD90 following the Census and Rep. Burnam opposed creating HD90 as a Latino voter majority district. At the time, HD90 was underpopulated by 26,288 (-15.68%) with a fast-growing Latino population that was 47.9% of the district's citizen voting age population (CVAP). 2017 Task Force Ex. 23C; Dkt. 1364 at 13-14, ¶ 69. Rep. Burnam had represented HD90 since 1997. Although Rep. Burnam believed that 2011 was the first redistricting cycle in which HD90 could be drawn as a Latino-majority

district, he instead submitted to the legislative leadership a proposed HD90 that lowered the Hispanic citizen voting age population (HCVAP) to 43.2%. Dkt.1364 at 14, ¶¶ 69, 70. The Texas Latino Redistricting Task Force, a statewide coalition of Latino organizations and advocates, responded by proposing that HD90 be configured with 51.7% HCVAP. Dkt. 1364 at 127, ¶ 627. Over Rep. Burnam's objections, the Texas Legislature adopted HD90 with a 49.7% HCVAP and 50.1% Spanish Surnamed Voter Registration (SSVR). Dkt. 1364 at 129-130, ¶¶ 634, 637.

In its March 19, 2012, opinion and February 28, 2012 order adopting the interim House redistricting plan H309, the district court did not alter HD90 or any other district in Tarrant County. Dkt. 682, 690.

A Latino candidate challenged Rep. Burnam in the 2012 Democratic Primary for HD90. Rep. Burnam attributed the 2011 changes to the district as the reason he drew a challenger for the first time in 16 years. J.S. 72a. Rep. Burnam prevailed in that race, but only by 159 votes. J.S. 72a. Voting was racially polarized in the Democratic primary. Mr. Burnam's Latino opponent received 70.6% of the Latino vote while Mr. Burnam received the majority of Anglo and African American votes. *Ibid.* Following his nomination as the Democratic candidate, Rep. Burnam was re-elected in the 2012 General Election for HD90.

4. In the 2013 special legislative session, then-Attorney General Greg Abbott urged the Texas Legislature to adopt the 2012 interim House plan in

order to "insulate the State's redistricting plans from further legal challenge." J.S. 440a. Rep. Burnam began work on new boundaries for HD90. Rep. Burnam's goal was to add a large non-Latino precinct named Lake Como, or simply Como, to HD90. The Como precinct was "a high turnout neighborhood that . . . had consistently and overwhelmingly supported [Rep. Burnam] throughout his time as HD90's representative." J.S. 83a. The Lake Como precinct had been shed from HD90 in the 2011 redistricting and Rep. Burnam wanted it back.

Rep. Burnam directed his chief of staff, Conor Kenny, to use the State's redistricting software to redraw HD90 to include Como. Intending to offer the redrawn HD90 as an amendment on the House floor, Rep. Burnam discussed his proposal with the Chairman of the House Redistricting Committee, Drew Darby. Rep. Burnam testified that Chairman Darby was "fixated" on maintaining at least 50% SSVR in HD90. J.S. 82a.

Rep. Burnam directed Mr. Kenny to raise the SSVR of HD90 above 50%. Instead of releasing Como, which had caused the drop in Latino population of the district, Mr. Burnam instructed Mr. Kenny to split precincts and swap Census blocks to add Latino population and exclude Anglo population. According to Rep. Burnam, "we really made some ugly lines to – basically we got rid of every white voter near the western boundary of the district to keep the Hispanic vote over 50 percent, but to get Como back into the district[.]" J.S. 73a. Rep. Burnam instructed Mr. Kenny on how to

draw HD90, including pointing to areas and instructing Mr. Kenny to add areas. Task Force M.D.A. 2a-3a. Rep. Burnam directed Mr. Kenny in drawing maps of HD90 because Rep. Burnam was familiar with the relevant neighborhoods and Mr. Kenny was not. Task Force M.D.A. 4a; 2017 Trial Tr. 658:10-12.

During the House floor debate on the redistricting bill, Rep. Burnam laid out his amendment, explaining that it "take[s] the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district." J.S. 80a. Chairman Darby then urged the members to approve the amendment, stating that Rep. Burnam's final version of his amendment "br[ought] the numbers back over 50%." *Id.* at 81a. The amendment passed.

5. In the next Democratic primary for HD90, held in March 2014, Rep. Burnam was again challenged by a Latino opponent, a local businessman named Ramon Romero. J.S. 75a. The campaign was "hostile." J.S. 75a. Rep. Burnam conducted Spanish language robocalls urging Latino voters not to open their doors to Romero campaign workers and a political action committee supporting Rep. Burnam sent out mailers accusing Mr. Romero of being a member of the Latin Kings street gang. J.S. 75a-76a.

Mr. Romero received close to 80% of the Latino vote in the March 2014 Democratic primary and prevailed over Rep. Burnam by a narrow margin. *Ibid.* Mr. Romero subsequently won the 2014 General Election for HD90.

6. Following the State's reconfiguration of HD90 in 2013, a group of plaintiffs – appellees here – amended their complaint to claim that HD90 in H358 was an unconstitutional racial gerrymander and intentionally diluted Latino voting strength. Dkt. 891.

Following trial, the district court held in 2017 that HD90 was not intentionally dilutive but that it was an unconstitutional racial gerrymander. J.S. 71a-84a.

Texas argued in the district court that any use of race in redrawing HD90 was limited to Conor Kenny, the staffer for Rep. Burnam, and "there is no evidence that any member of the Legislature knew about Kenny's reliance on race." Docket no. 1526 at 87. Texas asserted that "[t]here is no evidence that the 2013 Legislature accepted the amendment to HD90 for any reason other than the reason stated on the record – to return Como to the district." *Id.* at 70. To the extent Texas described a belief that the use of race in HD90 was "necessary to avoid a potential violation of the Voting Rights Act," *id.* at 87, Texas limited that belief to Mr. Kenny. *Ibid.*; *see also id.* at 89 ("There is no evidence that Representative Geren, Chairman Darby, or any other member of the Legislature knew how the proposed amendment to HD 90 was drafted.").

The district court concluded first that Texas had made predominant use of race in redistricting HD90. The district court relied on "strong direct evidence" in the form of testimony by the amendment's author, Rep. Burnam, and his Chief of Staff Conor Kenny, that "explicitly acknowledg[ed] the use of race in their method"

and testimony by "Burnam speaking candidly about there being 'too many white people' in HD90." J.S. 77a. The district court noted that Rep. Burnam's statements on the House floor "are as naked a confession as there can be to moving voters into and out of districts purely on the basis of race[.]" J.S. 81a.

The district court also relied on evidence that Redistricting Committee Chairman Darby employed a mechanical racial target for Latino voter population in HD90 to conclude that "race was the predominant factor in the design of the district as a whole in 2013." J.S. 80a (noting that Chairman Darby urged House members to vote for the redrawn HD90 because it kept "the numbers back over 50%."); *see also* J.S. 82a (Rep. Burnam testified that "Darby was simply 'fixated on the number,' meaning the 50% SSVR target.").

Subjecting the use of race in HD90 to strict scrutiny, the district court held that the State's "use of race in drawing HD90 was not narrowly tailored to achieve a compelling government interest." *Id.* at 83a. The district court concluded that "the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA." J.S. 82a. The district court relied on testimony by Conor Kenny that he "did not review election data or political data outside of SSVR." J.S. 82a. The district court also noted that "Burnam did not consider any changes in election performance or how primary results might change" and Chairman Darby had declined to provide "any meaningful testimony as to the potential significance of a 50% SSVR threshold or whether he considered any

other meaningful election metrics." J.S. 82a. Based on this evidence, and its evaluation of the credibility of witness testimony, the district court held that the State's invocation of VRA compliance was "vague" and that the State's use of race lacked a "strong basis in evidence." J.S. 81a, 82a.

The district court concluded that the racial gerrymandering violation, along with other intentional discrimination in H358, "must be remedied." J.S. 85a. Instead of following the schedule set out by the district court to consider what, if any, remedy would be appropriate before the 2018 election, Texas filed a notice of appeal and requested a stay from this Court. On September 12, 2017, this Court granted a stay of the district court's order pending the timely filing and disposition of an appeal. *Abbott v. Perez*, No. 17A245.

REASONS FOR GRANTING THE MOTION

I. If the Court concludes it has jurisdiction, it should affirm the district court's decision that HD90 is unconstitutionally racially gerrymandered

The HD90 appeal is straightforward. There is no serious question that Texas made predominant use of race in redrawing HD90. The author of HD90's new boundaries testified that he and his chief of staff assigned voters into and out of HD90 because of their race. Redistricting Chairman Darby and Rep. Burnam further employed a mechanical racial target of 50%

SSVR for the district as a whole. The State's use of race overrode traditional redistricting criteria such as respect for political jurisdictions and precinct boundaries.

HD90 cannot survive strict scrutiny. The district court applied this Court's recent rulings in racial gerrymandering cases and, finding no evidence that Texas legislators, including Rep. Burnam or Chairman Darby, had "a strong basis in evidence" to conclude that the Voting Rights Act required the use of race in redistricting HD90, the district court properly held that HD90 was not narrowly tailored to achieve a compelling government interest. J.S. 81a.

The district court's findings of fact are reversible only for clear error. This Court will not reverse unless it has a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985). With respect to findings of fact, this Court will "not reverse just because we 'would have decided the [matter] differently.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (*quoting Anderson*, 470 U.S. at 573). "And in deciding [whether there is clear error], we give singular deference to a trial court's judgments about the credibility of witnesses." *Id.* at 1474. The district court's assessment of the state's purpose in redrawing HD90 similarly is a finding of fact that "warrants significant deference on appeal to this Court." *Id.* at 1464.

A. This Court should affirm the district court's holding that race predominated in redrawing HD90

Texas does not challenge the district court's holding that the State made predominant use of race when redrawing HD90. J.S. 84 ("But even if race had been the predominant motive for the 2013 Legislature's drawing of HD90 . . .).

Following the two-step analysis set out in *Miller*, the district court first examined whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463 (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); *see also Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264 (2015). In its analysis, the district court properly relied on "'direct evidence' of legislative intent [and] circumstantial evidence of a district's shape and demographics[.]" *Cooper*, 137 S. Ct. at 1464 (citing *Miller*, 515 U.S. at 916.)

Rep. Burnam, the author of the redrawn HD90, frankly admitted that he used race to assign voters into and out of HD90. *See* supra at 3-5. The district court concluded that Rep. Burnam's testimony, which is uncontested by Texas, constituted "strong direct evidence that race was the predominate factor motivating the decision of which individuals to place within and without HD90." J.S. 77a. *See also Cooper*, 137 S. Ct. at 1468 (crediting "uncontested evidence in the record").

The district court also properly relied on circumstantial evidence that Texas subordinated traditional race-neutral districting principles, such as respect for political subdivisions and election precinct boundaries, to racial considerations. *See Miller* at 916. For example, Rep. Burnam testified that achieving population equality "was kind of lost in the process" because "we had to deal with taking as many white voters out as we could[.]" Task Force M.D.A. 4a. Rep. Burnam also split the City of Sansom Park in order to exclude Anglo voters from HD90. Task Force M.D.A. 5a. The district court observed overall that the changes to HD90 split ten election precincts and that the precinct splits furthered none other than a racial goal. J.S. 77a; *see also Bethune-Hill*, 137 S. Ct. at 799 ("In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so."). The district court further found that "neither Burnam nor Kenny identified other traditional redistricting criteria that would have justified the[] changes" to HD90. J.S. 77a-78a.

Furthermore, the district court found that redistricters employed a racial target in HD90 and subordinated traditional redistricting criteria to this target. When Rep. Burnam added the Lake Como precinct back into HD90, the district's SSVR dropped below 50%. Rep. Burnam then traded Latino and Anglo population into and out of HD90 to raise the SSVR to 50.1% as required by Redistricting Committee Chairman Darby. *See* J.S. 82a (Rep. Burnam testified that Chairman Darby was "fixated on the number" of 50%

SSVR and Chairman Darby urged House members to vote for changes to HD90 because the latest version "br[ought] the numbers back over 50%.").

The district court relied on the uncontested direct and circumstantial evidence in this case, including "an announced racial target that subordinated other districting criteria" to hold that race predominated in the redrawing of HD90. *Cooper*, 137 S. Ct. at 1469 ("Indeed . . . the court could hardly have concluded anything but."). *See also Alabama Legislative Black Caucus*, 135 S. Ct. at 1271 (concluding that legislators' pursuit of racial targets and splitting of precincts to achieve this goal constitutes "strong, perhaps overwhelming, evidence that race did predominate as a factor[.]"). The district court's examination of both the specific boundary changes to HD90 in 2013 and the overall construction of the district was consistent with this Court's guidance in *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800, 197 L. Ed. 2d 85 (2017) ("[T]he court should not confine its analysis to the conflicting portions of the lines. That is because the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district.").

B. Texas lacked a compelling state interest in redrawing HD90

In its Jurisdictional Statement, Texas abandons its previous argument that legislators' sole purpose in redrawing HD90 was to restore Lake Como to the

district. *See* Docket no. 1526 at 70 ("There is no evidence that the 2013 Legislature accepted the amendment to HD 90 for any reason other than the reason stated on the record – to return Como to the district[.]") and *id.* at 87 ("there is no evidence that any member of the Legislature knew about Kenny's reliance on race."). The State's new argument, that legislators used race in HD90 to comply with the Voting Rights Act, finds no toehold in the record.

The district court properly subjected the State's use of race to strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 800; *see also Cooper*, 137 S. Ct. at 1464 ("The burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest'; and is 'narrowly tailored' to that end."). Although compliance with the Voting Rights Act, 52 U.S.C. § 10301, *et seq.* has long been assumed to be a compelling reason for the predominant use of race in redistricting, *see Cooper*, 137 S. Ct. at 1464, in this case Texas redistricters never referred to compliance with the Voting Rights Act as the reason for the 2013 changes to HD90.

Discussion of redrawing HD90 to comply with the Voting Rights Act appears nowhere in the 2013 legislative record. On the House floor, Representative Burnam, the amendment's author, stated only that the new boundaries for HD90 restored the Como precinct to HD90 and also moved Anglos out of HD90 and minority voters into HD90. J.S. 80a-81a. Although Chairman Darby was "fixated" on keeping HD90's Hispanic voter registration over 50%, and urged House

members to support the redrawn HD90 on those grounds, Chairman Darby never explained his use of this numerical target. J.S. 82a. The district court also found that "Burnam and Chairman Darby apparently believed that HD90 should have an SSVR above 50% but the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA." J.S. 81a-82a. Furthermore, the record contains no emails, memoranda or other documents reflecting a concern about VRA compliance when redrawing HD90.

Commonly, a state may conclude that the Voting Rights Act requires use of race in redistricting because the elements of a vote dilution claim are present. *See, e.g., Cooper*, 137 S. Ct. at 1470 ("If a state has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district."). Here, the State's changes to HD90 were not spurred by a desire to create a Latino opportunity district in compliance with the VRA because HD90 was a Latino opportunity district before Rep. Burnam proposed redrawing it. In 2013, HD90 in Plan H309 had a majority of Latino citizen voting age population and a majority of Latino registered voters. 2017 Task Force Ex. 26-E at 3.[2]

---

[2] Ultimately, the State's redrawing of HD90 in 2013 resulted in a decrease in SSVR in the district. J.S. 73a. It is difficult to imagine how the VRA would require predominant use of race to *lower* the electoral strength of Latinos in an existing Latino opportunity district.

Similarly, the 2013 changes to HD90 were not made to preserve Latino electoral opportunity while raising the district's total population to comply with the one person one vote mandate. *See, e.g., Alabama Legislative Black Caucus*, 135 S. Ct. at 1263 (recognizing "particular difficulties" associated with trying to maintain minority electoral opportunity in underpopulated districts) *and Cooper*, 137 S. Ct. at 1474 (finding racial gerrymander where challenged district "was approximately the right size as it was[.]").

Finally, Texas does not argue that it redrew HD90 in anticipation of a favorable ruling for plaintiffs in the lawsuit challenging Plan H283 (the State's 2011 enactment). At the time that Texas redrew HD90 in 2013, the district court had made no determination regarding HD90 and Texas maintained that HD90 suffered from no legal defect. *See, e.g.,* Docket no. 1272 at 99.[3]

The State's bare assertion that legislators sought to comply with the VRA when redrawing HD90, without any supporting evidence, cannot establish that Texas had a compelling interest.

---

[3] In 2017, the district court rejected claims brought by some plaintiffs that HD90 "packed" Latino voters in violation of the VRA. The district court did conclude that Texas moved some Latino voters from HD93 into HD90 in violation of the VRA but left the question of remedy to be decided with the remedy for racial gerrymandering in HD90. J.S. 84a.

C. This Court should affirm the district court's holding that HD90's boundaries were not narrowly tailored to serve a compelling interest

In order to demonstrate narrow tailoring, a state must do more than merely invoke the Voting Rights Act. The state "must show . . . that it had 'a strong basis in evidence' for concluding that the statute required its action." *Cooper*, 137 S. Ct. at 1464 *quoting Alabama Legislative Black Caucus*, 135 S. Ct. at 1274. In other words, Texas must have "good reasons" to make predominant use of race (*Alabama Legislative Black Caucus*, 135 S. Ct. at 1274) that result from a "meaningful legislative inquiry into" VRA compliance. *Cooper*, 137 S. Ct. at 1461 (examining the legislative history of the redistricting bill for a careful evaluation of factors under the Voting Rights Act).

The legislative inquiry must include a "careful[] evaluat[ion]" of whether a VRA violation might occur without the predominant use of race. *Ibid*. Legislators must conduct a "careful assessment of local conditions and structures[.]" *Bethune-Hill*, 137 S. Ct. at 801. Considerations identified by this Court include "turnout rates . . . disenfranchised prison population, and voting patterns in the contested [] primary and general elections." *Bethune-Hill*, 137 S. Ct. at 797. This Court has also noted that process-related evidence, such as whether legislators met to discuss how to meet the requirements of the VRA, can evidence a meaningful legislative inquiry. *Id.* at 801.

Even assuming that Texas officials sought to comply with the VRA when they redrew HD90, and there is no evidence that they did, the district court found no evidence of a "meaningful legislative inquiry" into whether the Voting Rights Act required race-based redistricting.

As an initial matter, the Texas Attorney General urged the Legislature to adopt the 2012 interim House plan in order to "insulate the State's redistricting plans from further legal challenge." J.S. 440a. Rather than suggesting that the Voting Rights Act required the use of race in redrawing the boundaries of HD90, the State's chief lawyer recommended adopting the then-existing boundaries of HD90.

The Legislature held no hearings and took no public comment on possible changes to HD90. Rep. Burnam released his preliminary draft and final version of the redrawn HD90 only days before the Legislature's adoption of H358. 2017 Trial Tr. 661:10-18. As a result, no members of the public, or members of the Legislature (other than Chairman Darby) were in a position to suggest that the Voting Rights Act required any specific changes to the district.

In redrawing HD90, "[n]either Burnam nor Kenny examined election results while making these changes." J.S. 77a. Conor Kenny "never considered election or political data outside of SSVR" when using the GIS software to redraw HD90. J.S. 73a. The district court concluded: "There is no evidence that any legislator or staffer evaluated racially polarized voting in

HD90 or the amendment's effect on Latino voting ability in HD90. Burnam did not consider any changes in election performance or how primary results might change." J.S. 82a.

In addition, Rep. Burnam testified that Chairman Darby never spoke with Rep. Burnam about the potential of the changes to HD90 to dilute Hispanic voting strength beyond the question of SSVR. Task Force M.D.A. 10a. Chairman Geren, with whom Rep. Burnam swapped population in the redraw of HD90, testified that he and Rep. Burnam never had any conversations about the VRA implications of changing HD90's boundaries. (2017 Task Force Ex. 4 at 13). Texas conceded that "Kenny testified that he did not communicate with legislators (other than Burnam) at any point during his drafting of proposed amendments to HD 90." Docket no. 1526 at 89.

Texas offers a post-hoc justification for its redistricting by pointing to a brief exchange between legislative staffers. The district court made note of testimony by Conor Kenny, a legislative staffer for Rep. Burnam, that he had an "informal" conversation with a staffer for the chairman of MALC. J.S. 73a. However, in light of all the evidence, and based on credibility evaluations, the district court did not find that the exchange between staffers provided the "strong basis in evidence" required to justify the predominant use of race. J.S. 81a.

First, Texas maintained following trial that Conor Kenny did not make predominant use of race in

drafting HD90 and, even if he did, that legislators were unaware of his use of race. Docket no. 1526 at 70-71 ("[t]here is no evidence that the 2013 Legislature accepted the amendment to HD 90 for any reason other than the reason stated on the record – to return Como to the district, as Como residents had requested."). Having argued as recently as July 2017 that Conor Kenny was an independent actor whose predominant use of race, if it occurred at all, remained hidden from legislators, Texas cannot now reverse course and argue that Kenny's conversation with another staffer provides a compelling reason for the Legislature.

Second, neither Rep. Burnam nor Chairman Darby provided evidence that a conversation between staffers motivated their use of race in HD90. On the contrary, Rep. Burnam testified that he used race to redraw HD90 following a conversation with Redistricting Committee Chairman Darby and that Chairman Darby was "fixated" on the 50% SSVR number. J.S. 82a. Although decisonmakers need not memorialize every aspect of the redistricting process in writing, *see Bethune-Hill*, 137 S. Ct. at 802, they must at least show that VRA compliance motivated the drawing of district boundaries. *See Cooper*, 137 S. Ct. at 1468-1469 (noting that legislators "repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA.").

Third, Texas points to no evidence that the conversation between legislative staffers constituted a substantive exchange about the requirements of the Voting Rights Act. In its Jurisdictional Statement,

Texas does no more than quote the district court's observation that a MALC staffer "expressed concerns" over the lowered SSVR in the redrawn HD90 (J.S. 34).

As explained at trial by Conor Kenny, he took an early draft map of HD90 to a staffer for the Chairman of the Mexican American Legislative Caucus, "and just asked him what he thought of it, what his temperature was on it." Tr. 638. The staffer, Martin Golando, noted that the SSVR of HD90 had fallen below 50% and expressed doubts that MALC would support the proposal. *Ibid.* According to Kenny, Mr. Golando did not "indicate[ ] what the value behind that concern was." *Id.* at 638-639. Furthermore, Mr. Kenny could not say whether Mr. Golando was talking about support by MALC the legislative caucus or MALC members in their individual capacity. *Id.* at 661-662. Mr. Kenny's testimony contradicts the State's claims (without cites to the record) that MALC "insisted that failure to [maintain 50% SSVR] would violate VRA §2" (J.S. 4) or that MALC raised "a specific concern . . . that failure to maintain the percentage of Spanish-surnamed registered voters in HD90 would result in vote dilution." J.S. 15.

Mr. Kenny did not testify that after this conversation he made changes to HD90 in order to comply with the Voting Rights Act. Mr. Kenny testified that his changes to HD90 were intended to remove political objections because "we wanted to go in kind of quiet and fast and get this done before . . . they slammed the door shut on amendments." Tr. 640. Mr. Kenny explained his interest in the 50% SSVR target as follows: "Well, I

knew that it practically, you know, even if maybe leadership agreed if some of the people started to raise a lot of heck about it, then we could have problems with it." *Ibid.* The "problems" Mr. Kenny wanted to avoid were ones related to the legislative process. Mr. Kenny's testimony does not reflect the careful evaluation or meaningful inquiry into VRA liability required by *Cooper*. *See Cooper*, 137 S. Ct. at 1461, 1471.

The district court, after hearing the evidence at trial, "including live witness testimony subject to credibility determinations" (*Cooper*, 137 S. Ct. at 1474) concluded "the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA." J.S. 81a-82a. The State's disagreement with the district court's weighing of evidence and credibility determinations does not provide a basis for appeal. *See Cooper v. Harris*, 137 S. Ct. 1455, 1478 ("We cannot disrespect such credibility judgments . . . And more generally, we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it.").

Moreover, Texas cannot turn its fact dispute into an issue of law by claiming that the district court deprived Texas of "breathing room." J.S. 85. When a state offers no "good reasons" to believe that compliance with the VRA required making predominant use of race, the court is not required to rule that the challenged district survives strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 802.

Finally, even if the district court found that Texas had a strong basis in evidence to conclude that the VRA required maintenance of 50% SSVR in HD90, the solution was not to redraw the district to assign voters into and out of the district on the basis of race. The solution was to refrain from redrawing HD90 in 2013. The State's race-based redistricting of HD90 cannot survive strict scrutiny, even if the facts showed that the VRA required use of a mechanical 50% SSVR target, because it was always possible to meet that target without making predominant use of race.

II. The Court should dismiss this appeal for lack of jurisdiction

The Texas Latino Redistricting Task Force Appellees incorporate the arguments in section I. of the Motion to Dismiss or Affirm of Appellees Shannon Perez, et al. ("The Court should dismiss this appeal for lack of jurisdiction.").

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of jurisdiction or, alternatively, affirm the order of the district court.

Respectfully submitted,

NINA PERALES
Counsel of Record
ERNEST I. HERRERA
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, #300
San Antonio, TX 78205
Tel: (210) 224-5476
nperales@maldef.org

Counsel for Appellees Texas Latino Redistricting Task Force, et al.

No. 17-626

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY SUPPORTING JURISDICTIONAL STATEMENT

PAUL D. CLEMENT
ERIN E. MURPHY
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas
JEFFREY C. MATEER
First Assistant Attorney General
SCOTT A. KELLER
Solicitor General
Counsel of Record
MATTHEW H. FREDERICK
Deputy Solicitor General
MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

Page

I. This Court Has Jurisdiction to Review the District Court's Order. 1

II. The 2013 Legislature Did Not Engage in Intentional Discrimination When It Enacted Court-Ordered Districts as Its Own. 3

III. H358 Does Not Cause Any Vote-Dilution. 8

IV. The Legislature Did Not Engage in Unconstitutional Racial Gerrymandering in HD90. 10

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 3

Connor v. Waller, 421 U.S. 656 (1975) (per curiam) 6

Cooper v. Harris, 137 S. Ct. 1455 (2017) 3, 12

Gunn v. Univ. Comm. to End the War in Viet Nam, 399 U.S. 383 (1970) 1, 2

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) 3

Cases—Continued:

Miller v. Johnson,
515 U.S. 900 (1995) 8
Palmer v. Thompson,
403 U.S. 217 (1971) 9
Perry v. Perez,
565 U.S. 388 (2012) (per curiam) 4
Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 7, 8
Pullman-Standard v. Swint,
456 U.S. 273 (1982) 7
Shaw v. Reno,
509 U.S. 630 (1993) 8
Thornburg v. Gingles,
478 U.S. 30 (1986) 9
Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 5
White v. Regester,
412 U.S. 755 (1973) 3

Statutes:

28 U.S.C. §1253 2
52 U.S.C. §10301(b) 9

The plaintiffs' attempt to recycle failed jurisdictional arguments that were raised and rejected in the stay papers confirms this Court's jurisdiction. And their effort to defend the district court's decision to issue an advisory opinion about a moot challenge to a map never employed in a single election only confirms that the district court addressed the wrong question about the wrong map. This Court should deny the plaintiffs' motions and note probable jurisdiction or summarily reverse.

I. This Court Has Jurisdiction to Review the District Court's Order.

The plaintiffs do not seriously dispute that the district court's order invalidating Plan H358 had the practical effect of precluding its use in the 2018 elections. Nor could they, as the district court held that multiple State House districts violate the Constitution or the Voting Rights Act, and that those violations "must be remedied." J.S. App. 85a. Moreover, it made clear that if the Legislature did not immediately redraw these districts, the court would—and would do so in time for the 2018 elections. After all, the court would not have needed to put the Governor on a three-business-day deadline and otherwise rush to redraw the map if it had not already determined that the existing map could not be used in 2018.

The plaintiffs claim that none of this matters because *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970), "has already squarely rejected" the State's jurisdictional argument. MALC Mot. 19. But that argument has no more force now than when it was raised and rejected during the stay proceedings.

The starkly different facts and the reasoning in *Gunn* underscore that this Court has jurisdiction here. *Gunn* reasoned that "[o]ne of the basic reasons for the limit in 28 U.S.C. § 1253 upon [the Court's] power of review is that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided—a state of affairs that [was] conspicuously evident" in that case because the order appealed from was unclear as to what "was to be enjoined," "against whom" the injunction would run, and whether "all the provisions of the statute" were to be enjoined. *Gunn*, 399 U.S. at 388. Here, by contrast, the district court's order clearly blocks the State of Texas from using Plan H358 in 2018. The plaintiffs do not suggest otherwise.

The plaintiffs argue that the district court's order is a mere liability determination, not an injunction, because "there are many potential ways to remedy a particular violation." MALC Mot. 21. But this confuses whether the court's order is the final order in this case with the distinct question whether it enjoins the existing map. An injunction does not have to definitively resolve the case (otherwise, no preliminary injunction would be appealable); it just has to prevent the appealing party from doing something.[1] Because the district court's order prevents the State from conducting future elections using H358, it is appealable and not merely a resolution of liability. *Cf.*

---

[1] The district court's order here did much more than simply order the State "to come to court prepared to discuss remedies." MALC Mot. 21 n.9.

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742 (1976). This suffices to provide the Court with jurisdiction under §1253 even though the district court has not yet completed the remedial phase of the case.

The plaintiffs' reliance on *White v. Regester*, 412 U.S. 755 (1973), is also misplaced (as it was at the stay stage), as that case actually supports the State. *White* held that jurisdiction existed to review a district court order declaring Texas's House redistricting map unlawful, ordering the State to reapportion two counties into single districts, and stating that the court would reapportion the districts if the State did not. *Id.* at 760-61. That is exactly what the district court's order on Plan H358 does. The only distinction is that the district court in *White* expressly labeled its order an injunction. But as *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), makes clear, it is the practical effect—not the label—of the order that matters. *Id.* at 83. Because the district court's order has the same practical effect as the order in *White* and numerous other cases over which this Court has exercised jurisdiction, *see, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Gill v. Whitford*, No. 16-1161 (U.S.), it is equally appealable. The plaintiffs' contrary argument would artificially restrict *Carson* and allow district courts to evade this Court's jurisdiction by omitting magic words from their orders.

II. The 2013 Legislature Did Not Engage in Intentional Discrimination When It Enacted Court-Ordered Districts as Its Own.

The district court held that in 2013, the Texas Legislature engaged in intentional racial discrimination when

it adopted districts ordered by the district court itself under this Court's instruction to enter a remedial plan that had no discriminatory purpose or effect. *See Perry v. Perez*, 565 U.S. 388 (2012) (per curiam). That holding is both extraordinary and misleading. *See* J.S. 14-15.

1. The plaintiffs cannot deny that the district court's conclusion that *the 2013* Legislature engaged in intentional discrimination by embracing the court's own remedial plan was driven entirely by the court's (erroneous) view that *the 2011* Legislature engaged in intentional discrimination when it enacted *the 2011 plan*. That is wrong, as the relevant question for purposes of challenges to *Plan H358* is why *the 2013* Legislature enacted that plan. The motives of the 2011 Legislature in enacting a different plan simply did not matter. Unlike discriminatory *effect*, discriminatory *intent* does not carry over from one legislative enactment to another—and different—one. Accordingly, whether the plaintiffs had viable challeges to *the 2011 plan* was a question the district court never should have been asking in the first place.

The plaintiffs wisely concede that the district court lacked Article III jurisdiction over those challenges[2] because "any challenge to the continued use of Plan H283 would be moot." MALC Mot. 1.[3] Yet they nonetheless

---

[2] The plaintiffs helpfully note that their claims ultimately challenge statutes passed by the Legislature, not lines on a map. *See* MALC Mot. 1-2. Once the 2011 statute was repealed, the plaintiffs could bring live claims only against the 2013 statute that replaced it.

[3] The plaintiffs' desire for preclearance bail-in under VRA §3(c) could not keep those claims alive. Bail-in is not a "claim

maintain that the court's issuance of an advisory opinion on the 2011 plan "matters not at all" because the court "just as easily could have put" its findings on the 2011 plan into its opinion on Plan H358 instead of issuing a separate decision on the validity of the 2011 plan. *Id.* at 27. That misses the point. The advisory opinion on the 2011 plan is problematic not just because of the form in which it was issued, but because it asked the wrong question about the wrong legislature. The district court had no business adjudicating moot challenges to a repealed map or evading a clear focus on whether the 2013 Legislature adopted the district court's own map for discriminatory reasons.

The district court thought otherwise only because it was under the profoundly mistaken impression that the purported discriminatory *intent* of a past legislature must be "cured" by a future one. In reality, what matters is why the 2013 Legislature enacted the district court's remedial plan as its own. And the answer is clear: because that was its best chance to put an end to protracted litigation by enacting a districting plan that would pass constitutional and VRA muster.

---

against Plan H283," MALC Mot. 27 n.10; it is a prospective remedy that requires a judgment on live claims. And preclearance alone cannot provide Article III standing because it does not cure an ongoing concrete injury-in-fact currently suffered by the plaintiffs from Plan H283. *See, e.g., Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) (holding that a plaintiff's interest in a benefit—there, a *qui tam* relator's bounty—"that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes").

2. The plaintiffs attempt to resist that conclusion by emphasizing that the district court's 2012 remedial decision was not a final adjudication of challenges to the districts that the Legislature embraced. No one said it was. Indeed, the preliminary posture of that decision is part and parcel of why the district court applied a standard uniquely favorable *to the plaintiffs*.[4] But once the district court drew a map that remedied every district with a colorable defect based on a pro-plaintiff standard, that gave the Legislature every reason to believe that the map did not violate the Constitution or the VRA. It would have been strange indeed for the Legislature to ignore a directly on-point opinion from a federal court simply because it reflected preliminary, not final, findings and conclusions.

The plaintiffs nonetheless suggest that the Legislature should have held off because those conclusions "could change after a full trial on the merits." MALC Mot. 28. But there was no guarantee that there would ever be a trial on the 2011 plan, as the court could not hold one unless and until the plan was precleared. *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam). And indeed, the 2011 plan never was precleared, so (but for the district court's insistence on adjudicating

---

[4] Claims of retrogression and intentional discrimination under VRA §5 were judged under "the low 'not insubstantial' standard," J.S. App. 313a, outlined by this Court in *Perry v. Perez*. J.S. App. 302a. The remaining claims were considered under the standard for preliminary injunctions, which requires only a showing that the plaintiff is *likely* to succeed, not that it will actually do so. *Id.*

moot claims) the challenges to that map never should have been finally adjudicated.

3. The plaintiffs fare no better with their effort to insulate the district court's ruling from review by recasting it as a finding of fact. MALC Mot. 24-25, 29. The clear-error standard does not apply to fact findings that rest on legal errors. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). And the district court's conclusion about the 2013 Legislature's purpose is built on several legal errors—beginning with its failure to dismiss moot claims against the 2011 plan, on the theory that the 2013 Legislature could be held responsible for the purported wrongs of the 2011 Legislature, and ending with its application of a novel intentional-discrimination standard that conflicts with this Court's holding in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). *See* J.S. 24-25.

In reality, the district court's assessment of the districts it ordered in 2012 gave the Legislature the best possible basis to believe that adopting the district court's plan as its own would achieve compliance with the Constitution and the VRA. The district court's opinion in 2012 was crystal clear: "this Court's interim plan . . . does not incorporate any portion of the State map that is allegedly tainted by discriminatory purpose." J.S. App. 305a. The Legislature did not engage in intentional discrimination by taking the district court at its word.

Indeed, neither the plaintiffs nor the district court has identified any evidence that the 2013 Legislature

adopted Plan H358, or failed to alter any district, "because of," not "in spite of," its effect on minority voters. *Feeney*, 442 U.S. at 279.[5] To the contrary, the district court all but admitted that it had no basis to find actual discriminatory purpose by the 2013 Legislature when it expressly found "that the intentional discrimination in 2013 was limited to the Legislature's intent to maintain and perpetuate (without remedy) any infirmities in the plan that already existed." J.S. App. 7a. The undisputed fact that the 2013 Legislature relied on the district court's own remedial order, not to mention the presumptions of good faith and constitutionality, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), should have foreclosed any finding of discriminatory purpose here.

III. Plan H358 Does Not Cause Any Vote Dilution.

Even setting aside the district court's fatally flawed intent holding, the plaintiffs' vote-dilution claims still should have been rejected for failure to prove discriminatory effect. The plaintiffs try to get around that problem by arguing that vote-dilution claims do not require proof of vote-dilutive effect. That self-contradictory argument conflicts with this Court's precedent and the text of VRA §2.

This Court has made clear that a claim of intentional vote dilution under the Fourteenth Amendment requires proof of both intent to dilute minority voting strength *and* actual vote-dilutive effect. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (electoral systems "violate the

---

[5] The plaintiffs do not even attempt to defend the district court's one-person, one-vote rulings. *Cf.* J.S. 25-27.

Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"). Discriminatory intent alone cannot establish a constitutional violation. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

Accordingly, the plaintiffs must prove that they satisfy all three of the preconditions established by *Thornburg v. Gingles*, 478 U.S. 30 (1986), to prove that minority voters actually "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b). If those preconditions are not established, there is no basis to conclude that a plaintiff has been denied equal access to the political process and therefore no vote-dilutive effect.[6]

Even if the plaintiffs' newfound theory were sound, it is not the theory they advanced below. From the beginning, they have maintained that the Legislature intentionally diluted minority voting strength because "'despite massive minority population growth statewide,' [it] created no increase in the number of minority opportunity districts." MALC Mot. 3-4. And the failure to draw more legislative districts is the only harm they point to here. *See id.* at 32 (complaining that Dallas County districts "deny Latinos their fair share of seats within the

---

[6] The plaintiffs' attempt to limit their no-*Gingles*-required theory to cases involving intentional discrimination imposes no limit at all. *See* MALC Mot. 31. The plaintiffs—and the district court—erroneously rely on the State's failure to draw districts *not* required by *Gingles* as evidence of intentional discrimination.

county"). Yet, except in Nueces County, it is not even possible to draw additional majority-Hispanic districts. That should end the inquiry.

Even if two majority-Hispanic districts could have been drawn in Nueces County, there is no evidence of vote-dilutive effect there either, as the evidence showed the electoral performance in those two districts would have been "so low as to indicate a lack of real electoral opportunity in both districts." J.S. App. 44a. That evidence was introduced *by MALC* to prove that two bare majority-minority districts would *not* have been minority-*opportunity* districts under *Gingles*. *Id.* Moreover, that it may now be possible to draw two bare-HCVAP-majority districts in Nueces County does not prove that the Legislature diluted Hispanic voting strength by failing to draw such districts, particularly when doing so arguably would have overrepresented Hispanic voters. *Id.* at 51a. And alleged *statewide* underrepresentation is completely irrelevant to the question of vote dilution *in Nueces County*, MALC Mot. 34, particularly when the district court correctly found that "Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election." J.S. App. 55a.

IV. The Legislature Did Not Engage in Unconstitutional Racial Gerrymandering in HD90.

The Texas Latino Redistricting Task Force's motion shows how the district court's analysis as to HD90 put the Legislature in a double bind. The Task Force does not even attempt to defend the district court's illogical determination that HD90 was "tainted" by intentional

discrimination supposedly left over from 2011. J.S. App. 83a, 85a. Nor could it, as the Legislature redrew the district in 2013, and the district court itself correctly concluded that the redrawn district evinced a "lack of a discriminatory intent." *Id.* at 84a. Indeed, the Task Force effectively concedes the district court's error when it claims that the 2013 Legislature should have "refrain[ed] from redrawing HD90 in 2013." Task Force Mot. 25. But that claim succeeds only in confirming that, in the plaintiffs' view, the 2013 Legislature was bound to violate either the VRA or the Fourteenth Amendment no matter what it did in HD90.

The facts in HD90 are not disputed. The district was reconfigured to honor an African-American neighborhood's request to be brought back into the district, while also maintaining the district's Hispanic-voter-registration majority.[7] J.S. App. 72a-74a, 77a, 83a. The Legislature kept the percentage of Hispanic voters as close as possible to the preexisting level in direct response to MALC's claim that reducing the percentage of Hispanic voters would violate VRA §2. Yet the Task Force still brought VRA §2 vote-dilutive-effect claims against the State. *Id.* at 69a-70a, 83a-84a. If taking race into account to avoid a VRA §2 claim actually threatened by one mi-

---

[7] Texas does not concede that the motives or acts of a single staff member or legislator can be attributed to the entire Legislature. But if they are, the Legislature must also get the benefit of their favorable knowledge and statements. *Cf.* Task Force Mot. 22 (arguing that Texas cannot rely on conversations between staff members).

nority group just lays the groundwork for a racial gerrymandering claim by another, then there really is no "breathing room" for the Legislature to draw districts that comply with both the VRA and the Constitution. *Cooper*, 137 S. Ct. at 1464.

CONCLUSION

The Court should deny the plaintiffs' motions and note probable jurisdiction, or summarily reverse the district court's order invalidating Plan H358.

Respectfully submitted.

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

DECEMBER 2017

No. 17-626

In the Supreme Court of the United States

GREG ABBOTT, Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

On Appeal to the United States District Court for the Western District of Texas

BRIEF FOR LOUISIANA, ALABAMA, MICHIGAN, MISSOURI, OHIO, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING APPELLANTS

Jeff Landry
Attorney General

Elizabeth B. Murrill
Solicitor General
Counsel of Record
State of Louisiana
Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6766
Fax: (225) 326-6773
murrille@ag.louisiana.gov

Counsel for Amici Curiae

[Additional counsel listed on signature page]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE DISTRICT COURT IMPROPERLY IMPUTED A FINDING OF UNLAWFUL INTENT FROM A PRIOR LEGISLATIVE ACT 2

II. HOUSE DISTRICT 90 WAS NOT A RACIAL GERRYMANDER BECAUSE THE TEXAS LEGISLATURE HAD "GOOD REASONS TO BELIEVE" THAT THE VOTING RIGHTS ACT REQUIRED AN INCREASE IN MINORITY POPULATION 7

III. THE TEXAS LEGISLATURE DID NOT DILUTE MINORITY VOTING STRENGTH IN NUECES COUNTY BECAUSE IT WAS IMPOSSIBLE TO DRAW AN ADDITIONAL PERFORMING HISPANIC OPPORTUNITY DISTRICT 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Ala. Legis. Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 8, 9, 10

Balderas v. Texas, No. 6:01CV158, 2001 WL
36403750 (E.D. Tex. Nov. 14, 2001) 5

Bartlett v. Strickland,
556 U.S. 1 (2009) 11, 12, 14

Bethune-Hill v. Va. State Bd. Of Elections,
No. 3:14cv852 (E.D. Va. filed Dec. 22, 2014) ... 8

Bethune-Hill v. Va. State Bd. Of Elections,
141 F. Supp. 3d (2015) 8

Bethune-Hill v. Va. State Bd. Of Elections,
137 S. Ct. 788 (2017) 7, 8, 9, 10, 11, 14

Bush v. Vera,
517 U.S. 952 (1996) 7, 9, 10

Clements v. Valles,
620 S.W.2d 112 (Tex. 1981) 12

Cooper v. Harris,
137 S. Ct. 1455 (2017) 11

Connor v. Finch,
431 U.S. 408 (1977) 4

Favors v. Cuomo, Docket No. 11–cv–5632, 2012 WL
928216 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-
5632, 2012 WL 928223 (E.D.N.Y Mar. 19,
2012) 5

Gonzalez v. Harris County,
601 Fed. Appx. 255 (5th Cir. 2015) 14

Larios v. Cox,
306 F. Supp. 2d 1214 (N.D. Ga. 2004) 5

LULAC v. Perry,
548 U.S. 399 (2006) 13

Miller v. Johnson,
515 U.S. 900 (1995) 10

Molina v. Cty. of Orange, No. 13CV3018, 2013 WL 3039589 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013) 5

Perez v. Abbott,
2017 U.S. Dist. Lexis 136226,
2017 WL 3668115 (W.D.T.X. 2017) 3, 6

Perry v. Perez,
565 U.S. 388 (2012) 3, 5

Shaw v. Reno,
509 U.S. 630 (1993) 10, 11

Thornburg v. Gingles,
478 U.S. 30 (1986) 11

United States Dist. Court v. Texas,
2012 U.S. Dist. LEXIS 190609
(W.D.T.X. 2012) 3, 4, 6

Wise v. Lipscomb,
437 U.S. 535 (1978) 4

Wyche v. Madison Par. Police Jury,
635 F.2d 1151 (5th Cir. 1981) 5

Wyche v. Madison Par. Police Jury,
769 F.2d 265 (5th Cir. 1985) 4

CONSTITUTION

Tex. Const. art. III, § 26 11

OTHER AUTHORITIES

Texas Association of Counties, *Texas County Government*, available at: https://www.county.org/texas-county-government/Pages/default.aspx . 12

The University of Texas, *The Texas Politics Project*, available at: https://texaspolitics.utexas.edu/educational-resources/local-government-texas-constitution 12

STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici are the States of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin. The States have a vital interest in the law regarding redistricting, because redistricting is inherently a State function. The District Court's ruling, throwing elections into disarray, has widespread implications for states entering the 2018 election cycle and the coming 2020 redistricting cycle, destabilizing the democratic system in all states. Additionally, the District Court's ruling undermines the ability of states to rely in good faith on the validity of a District Court's precedent, which can lead to endless challenges and expense for a state in its efforts to comply with the Voting Rights Act ("VRA").

SUMMARY OF ARGUMENT

The State of Texas has requested that this Court should note probable jurisdiction or summarily reverse the District Court's decision to invalidate the State's Plan H358 ("2013 Plan") determining the boundaries of State legislative districts. The 2013 Plan incorporated all but a few districts from Plan H309 ("2012 Plan"). The 2012 Plan was a court-ordered, *court-drawn* remedial plan to remedy supposed violations contained in a 2011 plan that was never used in a single

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The State of Louisiana paid for this brief. All parties received timely notice of *amici curiae's* intention to file this brief.

legislative election. Now, the very same District Court that *drew and ordered* the use of the 2012 Plan has found that the 2013 Plan, which copied nearly all of the district boundaries from the Court's own 2012 Plan, "purposefully maintain[s] the intentional discrimination" from the 2011 plan. *See* J.S. App. 6a. That conclusion is as absurd as it is illogical. As the legislative history demonstrates, the Texas Legislature adopted a 2013 Plan, largely mimicking the Court's own 2012 Plan, for the express purpose of avoiding VRA violations. Unless the Court's own 2012 Plan contained districts in violation of the VRA - a possibility it expressly disclaimed in its opinion adopting the Plan - then the 2013 Plan *cannot* violate the VRA. Moreover, as described below, the specific districts questioned by the District Court do not violate the VRA as HD90 was not an impermissible gerrymander, nor was it possible to draw an additional performing Hispanic opportunity district in Nueces County. For the foregoing reasons, this Court should note probable jurisdiction or summarily reverse the District Court's decision.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY IMPUTED A FINDING OF UNLAWFUL INTENT FROM A PRIOR LEGISLATIVE ACT.

The District Court concluded the Texas Legislature possessed a racially discriminatory purpose in violation of § 2 and the Fourteenth Amendment by maintaining the 2012 plan, which had been drawn in large part and ordered to be implemented by that very court. Specifically, the District Court stated that the Legislature "purposefully maintained the intentional

discrimination contained in [the 2011 Plan]" because certain districts where the Court found violations "remain unchanged or substantially unchanged" in the 2013 Plan. *Perez v. Abbott*, 2017 U.S. Dist. Lexis 136226, *18, 2017 WL 3668115 (W.D.T.X. 2017). The District Court reached this conclusion by reasoning that it found violations in the 2011 Plan, drew and ordered the Legislature to adopt the 2013 Plan that it now proclaims did not remedy those violations, and that the Legislature did not pursue sufficient changes to the 2013 Plan beyond what was ordered.

The District Court's conclusion rests on circular reasoning and clearly erroneous speculation. The Court glosses over the fact that the 2013 Plan, regardless of whether it shares some district lines with the 2011 Plan, was found by *that same court* to expressly comply with the standards set forth by the Supreme Court in *Perry v. Perez*, 565 U.S. 388 (2012), § 2, and the Fourteenth Amendment. *United States Dist. Court v. Texas*, 2012 U.S. Dist. LEXIS 190609, *67-69 (W.D.T.X. 2012) (hereinafter "Opinion Explaining Plan H309"). In drawing and ordering the adoption of the 2013 Plan, the District Court went to great lengths to emphasize it was aware of the guidance set forth by the Supreme Court's ruling in *Perry v. Perez* and that the plan complied therewith. Opinion Explaining Plan H309 at *53, *67.

In accordance with the guidance from the Supreme Court, the District Court reviewed the State's valid political considerations and independently drew the 2013 Plan. Opinion Explaining Plan H309 at *67-68. The Court stated in express terms that the 2013 Plan corrected perceived defects and ordered the Legislature

to adopt it. *Id.* This represents a careful expression by the Court that it drew a plan free from the illegality present in the 2011 Plan. The Legislature relied on this expression and adopted the Court's plan almost exactly as put forth by the Court.[2]

This is not a case where a legislature intentionally adopted a discriminatory plan, as the District Court indicates. Rather, the Legislature merely adopted a plan that was judicially drawn and judicially approved as free from legal defect and discriminatory intent. It would *seem* that no sounder basis would exist upon which the Legislature could rely in believing the districts would meet judicial scrutiny on this point. For the Legislature in this case to be furthering preexisting intentional discrimination, *the District Court* would have to possess discriminatory intent in drawing and approving the plan, despite its clear statement that the plan eliminated underlying legal defects. Indeed, a court-drawn map, such as the 2013 Plan, is subject to a far higher standard than one drawn by a legislature. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the

---

[2] The sole exception being HD90, which was clearly amended because a Plaintiff, the Mexican American Legal Defense & Educational Fund, advocated for that amendment. The fact that such an amendment was pursued at the request of a Plaintiff should cut *against* a finding of intentional discrimination. Any other result is clearly erroneous and based on pure speculation.

protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies"); *Favors v. Cuomo,* Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified,* No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented,* No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted,* No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox,* 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001). The fact that the 2013 Plan may share some lines with the 2011 Plan is of no legal significance because the District Court adopted those lines as its own.

Given the clear, express conclusion of the District Court in 2012, paired with the guidance from the Supreme Court in *Perry v. Perez*, it was reasonable and indeed necessary for portions of the 2011 Plan to remain in the 2013 Plan and for the Legislature to adopt it almost entirely without change. The discriminatory intent the Court found in the 2011 Plan cannot logically or legally be said to have carried over to the 2013 Plan merely because some portions of the 2011 Plan are encompassed therein. Undeniably, the Supreme Court *instructed* the District Court and Legislature to look to the legal portions of the 2011

Plan in building a new plan and the District Court clearly and expressly found that the 2013 Plan complied with the Supreme Court's standards. Opinion Explaining Plan H309 at *53, *67-69. Simply put, the 2013 Plan is a new plan, cleansed of any underlying discriminatory purpose or intent from the 2011 Plan because the District Court's findings and orders in 2012 necessarily removed any taint. *See* string cite, *supra* at 4-5.

With the presumption of constitutionality afforded to legislative acts, none of the District Court findings aid in its conclusion that the Texas Legislature intentionally furthered pre-existing discriminatory purpose in enacting the 2013 Plan. On the contrary, the District Court's findings as to intent serve only to undercut its own conclusions. As the District Court notes, the Legislature adopted the 2013 Plan and, in an apparent effort to avoid risk of further litigation and "potential VRA problem[s]," permitted only minor amendments. *Perez v. Abbott*, 2017 U.S. Dist. Lexis at *16-17, *107. The Legislature could not wish to avoid further litigation and VRA violations if it was *intentionally* adopting a plan it knew to be rife with legal infirmities. The District Court's findings actually stand *against* the proposition that the Legislature was intentionally furthering an existing purposeful discrimination.

If the District Court is allowed to improperly attribute the intent of the Legislature when enacting the 2011 Plan onto an entirely separate legislative act (the 2013 Plan), the consequences flow well beyond this case. The District Court's holding essentially stands for the proposition that any legislative enactment once

found to have been motivated by discriminatory intent, could *never* be cured – even when the new maps rely upon a court order. If this circular logic stands, it will work extreme unfairness to states by calling into question the finality and legality of judgments in redistricting and other cases. States will never be sure if orders are valid or reliable and therefore risk years of ongoing litigation. Moreover, such reasoning would require legislatures similarly situated to scrap existing maps and redraw *all* of their electoral districts. A comprehensive redraw would occur at enormous cost to taxpayers and would slow the legislative process to a needless crawl.

The District Court improperly imputed the finding of unlawful intent from the 2011 Plan onto the 2013 Plan, thereby invaliding the plan that it drew, approved, and ordered enacted. Plainly stated, the 2013 Plan is a new plan, cleansed of any discriminatory influence of prior plans by the District Court's earlier finding that the plan was free from legal defects.

II. HOUSE DISTRICT 90 WAS NOT A RACIAL GERRYMANDER BECAUSE THE TEXAS LEGISLATURE HAD "GOOD REASONS TO BELIEVE" THAT THE VOTING RIGHTS ACT REQUIRED AN INCREASE IN MINORITY POPULATION.

In the VRA context, race-based qualifications must be narrowly tailored to further a compelling state interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). Compliance with the VRA has been presumed to be a compelling state interest. *See Bethune-Hill v. Va. State Bd. Of Elections,* 137 S. Ct. 788, 801 (2017) ("[T]he Court assumes, without deciding, that the State's

interest in complying with the Voting Rights Act [is] compelling."). "[T]he narrow tailoring requirement insists only that the legislature have a strong basis in evidence to support the (race based) choice that it has made." *Id.*; (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)). This Court has determined that a strong basis in evidence exists as long as the "legislature has '*good reasons* to believe' it must use race to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (2017) (emphasis in original). "[*G*]*ood reasons* to believe" is enough *even if* a court later finds the actions were *not necessary* to comply with the VRA. *Id.*

In *Bethune-Hill*, the district court found the Virginia Legislature allowed race to predominate the decision on the number of minority voters within a district.[3] *Id.* at 796-97. Since race was allowed to predominate in the creation of this district, the Legislature's action was subject to strict scrutiny. *Id.* at 801. On appeal, this Court determined the Virginia Legislature had "good reasons to believe" its actions were necessary with respect to District 75, a majority-minority district. *Id.* (This Court affirmed the District Court's analysis as to District 75, which found that

---

[3] The district court found that race did not predominate as to 11 of the 12 challenged districts. *Bethune-Hill v. Va. State Bd. Of Elections*, 141 F. Supp. 3d 505 (2015). This Court reversed and remanded for a determination of 11 of the 12 Virginia districts. *Bethune-Hill*, 137 S. Ct. at 802. However, this Court affirmed the decision of the district court that upheld the 12th district, District 75. *Id.* The trial on remand was held in October of 2017, but as of the date of this filing no order or opinion has been issued. *Bethune-Hill v. Va. State Bd. Of Elections*, No. 3:14cv852 (E.D. Va. filed Dec. 22, 2014).

even though race predominated, Virginia met its burden under strict scrutiny). Virginia's "good reasons to believe" that a certain percentage of black voting age population (BVAP) was necessary in District 12 included evidence of: 1) extensive meetings with the delegate from District 75; 2) discussions with incumbents of other majority-minority districts; and 3) recent election results and voter turnout rates. *Id.* at 801. This Court considered these factors important as a reflection of "the good faith efforts" of the Legislature. *Id.* (discussing the functional analysis that the Department of Justice required under Section 5).

In this case, the State of Texas similarly has "good reasons to believe" that its actions were justified to avoid racial gerrymandering.[4] First, the District Court approved of the original HD90 as a court-ordered plan (Plan H283). JA 84a-85a. Second, the Texas Legislature changed HD90 in order to, 1) attempt to protect an incumbent—a traditional districting criteria, *see e.g. Ala. Legis. Black Caucus*, 135 S. Ct. at 1270; *Vera*, 517 U.S. at 964, 968 (a racial gerrymandering case also involving the Texas legislature)—by including the Como Neighborhood, and 2) maintain the district as a Hispanic opportunity district at the request of the Mexican American Legislative Caucus, a Plaintiff-Appellee in this case. JA 83a-84a, 72a, 75a. Texas' stated reason for increasing Spanish-surname voter registration (SSVR) in HD90 was to protect the state from VRA litigation. JA 81a.

---

[4] *Amici* assumes, *arguendo*, that HD90 is subject to strict scrutiny in the first instance.

In the VRA context, it is a truism that race-based determinations are unavoidable. *See generally Bethune-Hill*, 137 S. Ct. 788; *Ala. Legis. Black Caucus*, 135 S. Ct. 1257; *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (redistricting performed with the "consciousness" of race is permissible and not subject to strict scrutiny). Certainly. then, making modest changes to an already court-approved district for the purpose of incumbent protection and avoiding liability under the VRA, must be, at the very least, a "*good reason*." *Id.* This is especially true when the Legislature was urged to make those changes by Plaintiff (Mexican American Legislative Caucus) because the Spanish surname voter registration was deemed by the Plaintiffs to be too low.[5] J.S. App. 72a. If traditional districting criteria and deference to the very minority group affected by the districting decision is not a strong basis in evidence then it is impossible to think of what else would be.

III. THE TEXAS LEGISLATURE DID NOT DILUTE MINORITY VOTING STRENGTH IN NUECES COUNTY BECAUSE IT WAS IMPOSSIBLE TO DRAW AN ADDITIONAL PERFORMING HISPANIC OPPORTUNITY DISTRICT.

Impermissible vote dilution has the "effect of diluting minority voting strength." *Shaw v. Reno*, 509

---

[5] The Mexican American Caucus is a Plaintiff-Appellee in this litigation; however, it does not specifically challenge HD90. However, the fact that the Texas legislature changed a map with input from one Hispanic group only to have that change challenged by another Hispanic group further points to the fact that the VRA places states with nearly impossible choices.

U.S. 630, 640 (1993). As this Court has stated, "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (emphasis added) (citing and quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)) (internal citations omitted). "Where an election district could be drawn in which minority voters form a majority but such a district is not drawn . . . then—assuming the other *Gingles* factors are also satisfied—denial of the *opportunity* to elect a candidate of choice is a present and discernible wrong . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (emphasis added). "[A] functional working majority" is a consideration in the VRA context. *Bethune-Hill*, 137 S. Ct. at 802 (explaining that in § 5 cases reducing minority voting strength to the level of non-performance could rise to the level of a violation even if the minority voting age population remained above 50%).

Nueces County *lost* population as of the 2010 census. J.S. App. 27a. The two minority opportunity districts that existed previously could no longer "be maintained in their benchmark configurations due to population loss." *Id.* at 59a. The Appellees have never shown how the State could draw more than one performing Hispanic opportunity district in Nueces County, which is what the current plan has. *See Id.* 54a-55a. There are two proposed plaintiff plans. *Id.* at 55a. One plan requires the State to subordinate the County Line Rule—a traditional redistricting criteria—to racial considerations. *See* Tex. Const. art. III, § 26 ("[W]henever a single county has sufficient population to be entitled to a Representative, such

county shall be formed into a separate Representative District . . . and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county.")[6]; *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981). The District Court properly rejected this plan. J.S. App. 54a. ("The Court finds that the County Line Rule is a legitimate and important traditional districting principle in Texas."). Appellees other plan draws two districts wholly within the county, but the District Court concluded those districts would not perform. J.S. App. 55a.[7] There is also significant electoral history in Appellees proposed HD32 and 34 indicating there is no real "opportunity to elect a candidate of choice" while maintaining two Hispanic opportunity districts in Nueces County. *See Strickland,* 556 U.S. at 19-20; J.S. App. 44a.

---

[6] The county has special importance as it is the principal local government entity in Texas. *See* The University of Texas, *The Texas Politics Project*, available at: https://texaspolitics.utexas.edu/educational-resources/local-government-texas-constitution; *see also* Texas Association of Counties, *Texas County Government*, available at: https://www.county.org/texas-county-government/Pages/default.aspx (explaining that Texas county governments are a "functional arm of state government," which provides significant services to the citizens of the county.) In Louisiana, parishes operate similarly.

[7] This is strictly in terms of Hispanic citizen voting age population based on citizenship estimates. Countywide Spanish Surname Voter Registration is less than 50% of the population in Nueces County, which is the data available to the Legislature at the time of the redistricting. J.S. App. 27a.

Plaintiff-Appellees offered map H400, which draws "two majority-HCVAP districts . . . wholly within Nueces County." J.S. App. 44a. However, according to Appellees' expert, both districts performance in exogenous elections is "so low as to indicate a *lack of real electoral opportunity in both districts.*" *Id.* (emphasis added) ("HD32 performed in 7/35 statewide elections[8] . . . and HD34 performed in 0/35 statewide elections between 2010 and 2016."). In fact, HD32 *only* performs in presidential election years. *Id.* HD34 *never* performs in *any* year. *Id.* The District Court found that the Appellees "demonstrated that an additional compact minority district could be drawn in Nueces County." *Id.* at 54a. This is despite all the evidence to the contrary and the fact that "Plaintiffs have not adequately demonstrated that they lack equal opportunity in a configuration" that does not break county lines." J.S. App. 55a. "A majority-minority district must provide '*real electoral opportunity*' to the minority group in order for § 2 to be fulfilled." *Id.* at 417a (emphasis added) (quoting *LULAC v. Perry*, 548 U.S. 399, 428 (2006)). The District Court is also correct when it points out that "real opportunity" does not equal a guarantee of success. *Id.* However, in this instance, it is not that there is a *low probability* of electoral success in Nueces County, it is that there appears to be *no* opportunity for electoral success, at least where HD34 is concerned. *See* J.S. App. 44a. It

---

[8] This performance analysis assumes the candidate of choice is always a democrat. J.S. App. 44a ("Democrats . . . [are] presumed to be the minority preferred candidate."). This presumption has several methodological flaws. However, *Amici* assume for the purposes of this argument, that Appellees' expert methodology is sound.

cannot be the case that a state is compelled to draw a minority opportunity district that has almost no chance of ever granting the minority population any opportunity. Any conclusion otherwise "afford[s] state legislatures too little breathing room." *Bethune-Hill*, 137 S. Ct. at 802.

Furthermore, the simple fact that the Appellees failed to carry their burden should end the inquiry with a finding of no vote dilutive effect. *See Strickland*, 556 U.S. at 19-20; *see also Gonzalez v. Harris County*, 601 Fed. Appx. 255, 258 (5th Cir. 2015). It is impossible that a second performing Hispanic opportunity district is required or even possible in Nueces County. Therefore, the District Court erred in finding two Hispanic opportunity districts were required within Nueces County to avoid impermissibly diluting minority voting strength, and this Court should note jurisdiction or summarily reverse to correct the District Court's error.

CONCLUSION

In finding that the 2013 Plan violated the VRA because the Legislature did not pursue extensive changes to the District Court's own map, the District Court upended the basic presumption of constitutionality afforded to legislative acts. The 2013 Plan, containing only minor changes from the 2012 map drawn *by the District Court* for the express purpose of complying with the Constitution and VRA represented the Legislature's effort to draw a compliant district by largely copying what the District Court provided. The 2013 Plan is fully compliant with the VRA, as HD90 is not an impermissible racial gerrymander, nor was it possible to draw an additional

performing Hispanic opportunity district in Nueces County. However, even if the 2011 Plan was infected with perceived discriminatory taint, the District Court's own redrawing of the map in 2012, which provided the basis for the 2013 Plan, necessarily cured any traces of VRA violations. Accordingly, *amici curiae* respectfully urge this Court to note probable jurisdiction or summarily reverse the District Court's decision.

Respectfully submitted,

Jeff Landry
Attorney General

Elizabeth B. Murrill
Solicitor General
Counsel of Record
State of Louisiana
Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6766
Fax: (225) 326-6773
murrille@ag.louisiana.gov

Counsel for Amici Curiae

Counsel for Additional *Amici*

Steven T. Marshall
Alabama Attorney General
501 Washington Ave.
Montgomery, AL 36104
(334)353-1018

Bill Schuette
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909
(517)373-1110

Josh Hawley
Missouri Attorney General
207 W. High Street
Jefferson City, MO 65102
(573) 751-3321

Michael DeWine
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215
(614)466-4986

Alan Wilson
South Carolina Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

Brad D. Schimel
Wisconsin Attorney General
17 W. Main Street
Madison, WI 53707
(608)266-1221